DOCKET

No. 13-1487

Title:	Tony Henderson, Petitioner
	v.
	United States
Docketed:	June 12, 2014
Linked with 13A1039	
Lower Ct:	United States Court of Appeals for the Eleventh Circuit
Case Nos.:	(12-14628)
Decision Date:	January 28, 2014

Questions Presented

--Date--	------Proceedings and Orders----------
Apr 14 2014	Application (13A1039) to extend the time to file a petition for a writ of certiorari from April 28, 2014 to June 27, 2014, submitted to Justice Thomas.
Apr 17 2014	Application (13A1039) granted by Justice Thomas extending the time to file until June 27, 2014.
Jun 10 2014	Petition for a writ of certiorari filed. (Response due July 14, 2014)
Jul 10 2014	Order extending time to file response to petition to and including August 13, 2014.
Aug 7 2014	Order further extending time to file response to petition to and including August 27, 2014.
Aug 27 2014	Brief of respondent United States in opposition filed.
Sep 9 2014	Reply of petitioner Tony Henderson filed.
Sep 10 2014	DISTRIBUTED for Conference of September 29, 2014.
Oct 6 2014	DISTRIBUTED for Conference of October 10, 2014.
Oct 14 2014	DISTRIBUTED for Conference of October 17, 2014.
Oct 20 2014	Petition GRANTED.
Nov 20 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Dec 4 2014	The time to file the joint appendix and petitioner's brief on the merits is extended to and including December 8, 2014.
Dec 4 2014	The time to file respondent's brief on the merits is extended to and including January 13, 2015.
Dec 8 2014	Joint appendix filed. (Statement of costs filed.)
Dec 8 2014	Brief of petitioner Tony Henderson filed.
Dec 12 2014	Brief amicus curiae of Institute for Justice filed.
Dec 15 2014	Brief amici curiae of Gun Owners of America, Inc., et al. filed.
Dec 15 2014	Brief amicus curiae of The National Association of Criminal Defense Lawyers filed.
Dec 15 2014	Brief amici curiae of CRPA Foundation, et al. filed.
Dec 15 2014	Brief amici curiae of Commonwealth Second Amendment, Inc., et al. filed.

Dec 15 2014	Brief amicus curiae of National Rifle Association of America, Inc. filed.
Dec 22 2014	SET FOR ARGUMENT ON Tuesday, February 24, 2015
Dec 22 2014	Record requested from U.S.C.A. 11th Circuit.
Jan 6 2015	Record for United States District Court for the District of Jacksonville available on Pacer.
Jan 6 2015	Record received from U.S.C.A. 11th Circuit. (1 - Envelope)
Jan 7 2015	CIRCULATED.
Jan 13 2015	Brief of respondent United States filed. (Distributed)
Jan 14 2015	Record received from U.S.D.C. Middle Dist. of Florida. (1 - Envelope) Part of the Record is SEALED.
Jan 20 2015	Brief amicus curiae of The Brady Center to Prevent Gun Violence filed. (Distributed)
Feb 12 2015	Reply of petitioner Tony Henderson filed. (Distributed)
Feb 24 2015	Argued. For petitioner: Daniel R. Ortiz, Charlottesville, Va. For respondent: Ann O'Connell, Assistant to the Solicitor General, Department of Justice, Washington, D. C.
May 18 2015	Judgment VACATED and case REMANDED. Kagan, J., delivered the opinion for a unanimous Court.
Jun 19 2015	JUDGMENT ISSUED.

PETITION FOR WRIT OF CERTIORARI

13-1487

No.

Supreme Court, U.S.
FILED
JUN 19 2014
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

TONY HENDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

"The general rule is that seized property, other than contraband, should be returned to its rightful owner once * * * criminal proceedings have terminated." *Cooper* v. *City of Greenwood*, 904 F.2d 302, 304 (5th Cir. 1990) (quoting *United States* v. *Farrell*, 606 F.2d 1341, 1343 (D.C. Cir. 1979) (quoting *United States* v. *La Fatch*, 565 F.2d 81, 83 (6th Cir. 1977))). 18 U.S.C. § 922(g) makes it "unlawful for any person * * * who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year * * * to * * * possess * * * any firearm."

The question presented is whether such a conviction prevents a court under Rule 41(g) of the Federal Rules of Criminal Procedure or under general equity principles from ordering that the government (1) transfer non-contraband firearms to an unrelated third party to whom the defendant has sold all his property interests or (2) sell the firearms for the benefit of the defendant. The Second, Fifth, and Seventh Circuits and the Montana Supreme Court all allow lower courts to order such transfers or sales; the Third, Sixth, Eighth and Eleventh Circuits, by contrast, bar them.

TABLE OF CONTENTS

Page

Table Of Authorities IV

Opinions Below 1

Jurisdiction 1

Statutory Provision And Rule Involved 1

Statement 1

A. Factual Background 4

B. Procedural History 7

Reasons For Granting The Petition 8

I. The Circuits Disagree About Whether Section 922(g) Extinguishes Only Possessory Interests Or All Ownership Interests In Non-Contraband Firearms 9

A. Four Federal Circuits Have Held That Section 922(g) Extinguishes All Property Interests In Non-Contraband Firearms 9

B. Three Circuits And The Montana Supreme Court Have Held That Section 922(g) Leaves Non-Possessory Interests In Firearms Intact 11

II. The Decision Below Is Wrong 16

A. The Eleventh Circuit's Rule Confuses Possession Of A Firearm With Other Incidents Of Ownership 17

B. The Eleventh Circuit's Rule Raises Constitutional Concerns 23

C. The Eleventh Circuit's "Unclean Hands" Rationale Does Not Support Denying Relief Absent Wrongdoing Related To The Property 26

III. This Recurring Issue Is Of National Importance 28

IV. This Case Represents An Ideal Vehicle For Resolving The Conflict 31

Conclusion 32

APPENDIX CONTENTS

Page

Eleventh Circuit Opinion 1a

District Court Order 5a

Magistrate Judge's Report and Recommendation 7a

TABLE OF AUTHORITIES

Cases: **Page(s)**

Andrus v. *Allard*, 444 U.S. 51 (1979) 24

Austin v. *United States*, 509 U.S. 602 (1993) 23

Clark v. *Martinez*, 543 U.S. 371 (2005) 24

Connecticut Nat'l Bank v. *Germain*, 503 U.S. 249 (1992) 22

Cooper v. *City of Greenwood*, 904 F.2d 302 (5th Cir. 1990). ..... *passim*

Degen v. *United States*, 517 U.S. 820 (1996) 28

Hibbs v. *Winn*, 542 U.S. 88 (2004) 22

Keystone Driller Co. v. *Gen. Excavator Co.*, 290 U.S. 240 (1933) 26, 27

Lee v. *City of Chicago*, 330 F.3d 456 (7th Cir. 2003) 14, 24

Loretto v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) 20

Loughran v. *Loughran*, 292 U.S. 216 (1934) 26

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United States v. *Kaczynski*, 551 F.3d 1120 (9th Cir. 2009) 27

United States v. *Kriesel*, 604 F.3d 1124 (9th Cir. 2010) 14-15

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18 U.S.C. § 922(j) 21

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-4a) is unreported, but available at 2014 WL 292169. The order of the district court (App., *infra*, 5a-6a) adopting the magistrate judge's report and recommendation is unreported. The magistrate judge's report and recommendation (App., *infra*, 7a-14a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 2014. On April 17, 2014, Justice Thomas extended the time for filing a petition for a writ of certiorari until June 27, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION AND RULE INVOLVED

Section 922(g) of Title 18 of the United States Code provides, in pertinent part, that "[i]t shall be unlawful for any person * * * who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year * * * to * * * possess in or affecting commerce[] any firearm or ammunition."

Rule 41(g) of the Federal Rules of Criminal Procedure provides, in pertinent part, that "a person aggrieved by * * * the deprivation of property may move for the property's return."

STATEMENT

This case concerns an important and recurring question at the intersection of criminal and property law: Whether 18 U.S.C. § 922(g), which prohibits a convicted felon from "possessing * * * any firearm or ammunition," also tacitly extinguishes that person's entire ownership interest in firearms unrelated to the offense of conviction that the person lawfully owned before the offense.

Petitioner was a United States Border Patrol agent who voluntarily turned over his firearms to the FBI while unrelated marijuana charges were pending against him. Following petitioner's guilty plea and service of his six-month sentence, the FBI refused to transfer his personal firearms to an unrelated third party who had purchased them. In response, petitioner filed a motion under Fed. R. Crim. P. 41(g) asking that the guns be transferred to the buyer or, alternatively, to petitioner's wife.

Although recognizing that courts nationwide are divided about whether Section 922(g)'s prohibition on possession prevents a convicted felon from transferring his nonpossessory property interest in firearms, App., *infra*, 3a, 11a-13a, the courts below considered themselves bound by circuit precedent to deny petitioner relief, holding that allowing such a person to transfer his nonpossessory interest to an innocent third party would be tantamount to giving him or her "constructive possession" over it. App., *infra*, 4a (citing *United States* v. *Howell*, 425 F.3d 971, 976-977 (11th Cir. 2005)); *id.* at 14a (same). In addition, the Eleventh Circuit, again relying on circuit precedent, held that "a defendant convicted of a drug offense ha[s] unclean hands to demand" transfer of his firearms, "even though, as with [petitioner], that defendant did not use those firearms in furtherance of his offense." *Id.* at 4a.

The decision below is part of a recognized split among the circuits, which are sharply divided over whether a convicted felon may transfer his nonpossessory property interest in unrelated firearms, or whether Section 922(g)'s prohibition on possession permits the government to deprive owners of any economic interest in them without legal process or compensation. See Frederick C. Benson, Comment, *The Firearm-Disability Dilemma:*

Property Insights into Felon Gun Rights, 80 U. Chi. L. Rev. 1231, 1245 (2013) (recognizing "circuit split" with courts "divided into two camps"; "some courts recogniz[e] a residual property right in firearms for those subjected to the firearm-disability dilemma and others refus[e] to do so"). The Eleventh Circuit joined the Third, Sixth, and Eighth Circuits in holding that any attempt to transfer an ownership interest to a third party would place the transferor in constructive possession and thus violate 18 U.S.C. § 922(g). See *United States* v. *Roberts*, 322 F. App'x 175, 176-177 (3d Cir. 2009); *United States* v. *Headley*, 50 F. App'x 266, 267-268 (6th Cir. 2002); *United States* v. *Felici*, 208 F.3d 667, 670 (8th Cir. 2000).

By contrast, the Seventh, Second, and Fifth Circuits have explicitly rejected the Eleventh Circuit's position and held that a person convicted of a felony may transfer his nonpossessory ownership interest in firearms to a third party because "[the owner's] interest in the firearms continues even though his possessory interest has been curtailed." *United States* v. *Miller*, 588 F.3d 418, 420 (7th Cir. 2009) (Easterbrook, J.). As the Seventh Circuit noted, a contrary conclusion would turn Section 922(g) into "the functional equivalent of forfeiture," and would "nullif[y] the statute of limitations" (among other protections) in a proceeding to forfeit the firearms. *Id.* at 419. The Second Circuit agrees, holding that a person convicted of a felony may validly transfer his ownership interest in firearms through a Rule 41(g) motion. *United States* v. *Zaleski*, 686 F.3d 90, 93 (2d Cir.), cert. denied, 133 S. Ct. 554 (2012). The Fifth Circuit likewise holds that such a person maintains an ownership interest in his firearms, which may be "sold for [his] account." See *Cooper* v. *City of Greenwood*, 904 F.2d 302, 305-306 (5th Cir. 1990). And the Montana Supreme Court has likewise

held that a court may, consistent with Section 922(g), transfer such firearms to a third party or to have the State sell firearms for the benefit of their owner. *State* v. *Fadness*, 268 P.3d 17, 20, 29-30 (Mont. 2012). And no other court has accepted the Eleventh Circuit's "unclean hands" theory for denying the disposition of property unrelated to criminal or inequitable conduct.

The Eleventh Circuit's decision cannot stand. It entrenches a recognized split among the federal courts of appeal on a frequently recurring issue. It allows the government—based on a statutory prohibition on mere *possession*—to bypass formal forfeiture procedures and effectively strip gun owners of their entire ownership interest in significant, lawful household assets following a conviction for an unrelated offense. And it deprives those persons of assets they could use to contribute to the support of their dependents at the very time that imprisonment prevents them from supporting the household with employment income. Further review is warranted.

A. Factual Background

1. In early June 2006, petitioner was arrested and charged with distributing marijuana in violation of 21 U.S.C. § 841(a)(1). App., *infra*, 2a. At petitioner's bond hearing, the magistrate judge required that petitioner surrender the service firearm issued to him in connection with his unrelated employment with the United State Border Patrol. C.A. Expanded Excerpts of R. 54 ("E.R."). The magistrate judge also requested that petitioner surrender his personal firearms to the FBI while criminal charges were pending. See E.R. 61. Petitioner complied and voluntarily turned over to the

FBI fifteen firearms[1] and other items valued at $3,570.92. E.R. 65-66, 69-70. On the "Receipt for Property" it issued petitioner, the FBI marked the box indicating that the items were "Received From" him; it left unmarked the box indicating that items were "Seized" from him. E.R. 65. Petitioner later pleaded guilty to the drug charges and was sentenced to six months' imprisonment. Gov't C.A. Br. 2.

2. Beginning in November 2008, after serving his sentence, petitioner contacted the FBI to arrange for the transfer of his firearms to a third party. App., *infra*, 9a. Following the FBI's instructions, petitioner submitted a letter describing his case together with a bill of sale and the contact information of the buyer, William Boggs. *Ibid.* When Mr. Boggs later chose to withdraw from the transaction because of pressure from the FBI, petitioner arranged to sell his ownership interest in the firearms to Robert Rosier, and again submitted the requested paperwork to the FBI. *Id.* at 10a.

After receiving no response for more than a month, petitioner wrote another letter to the FBI and attempted

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[1] The Eleventh Circuit's decision erroneously states petitioner surrendered "nineteen personal firearms," App., *infra*, 2a, but the FBI inventory indicates that the nineteenth item was not a firearm but spare magazines. E.R. 65-66 (Tab 155, Exh. 1). The remaining eighteen items also included a crossbow and two non-functioning guns. See E.R. 69-70 (describing antique Japanese rifle and home-made muzzle-loading rifle as "nonfunctional" and a third item as a "crossbow"); *id.* at 66 (describing muzzle-loader as "wall [h]anger"). Those three items are not classified as firearms under federal law, see 18 U.S.C. § 921(a)(3), and 18 U.S.C. § 922(g) does not apply to their possession. The remaining firearms included three surplus M1 Garand rifles dating from World War II and the Vietnam War, a host of .22 caliber rifles and pistols, two shotguns, and other pistols. The number of firearms is not material to the legal issue.

to contact an agent familiar with the case on four different occasions between April and June 2009. App., *infra*, 10a. Twelve months after submitting a signed bill of sale, petitioner received a letter from the Jacksonville FBI office asserting that the Bureau had "seized" his firearms on June 9, 2006—the date he voluntarily complied with the magistrate judge's request to surrender the firearms—and notifying him of the procedure for submitting claims. *Ibid.* In December 2009, petitioner and Mr. Rosier filed a claim with the FBI requesting that the agency transfer ownership to Mr. Rosier. *Ibid.* Four to five months later, the FBI rejected the claim, asserting that "the release of the firearms to you or your designee, Robert Rosier * * * would place you in violation of federal law as it would amount to constructive possession." E.R. 67 (citing *Howell*, 425 F.3d at 976-977, and *Felici*, 208 F.3d at 670). The letter advised that petitioner had 10 days to request reconsideration, which he did. E.R. 67, 111.

After receiving no response for another month, petitioner, proceeding *pro se*, filed a motion in district court under Rule 41(g) of the Federal Rules of Criminal Procedure, asking that the firearms be transferred to Mr. Rosier or petitioner's wife. App., *infra*, 2a; E.R. 61-62, 96. The magistrate judge assigned the case withheld action until the FBI issued a final agency decision on petitioner's request for reconsideration. E.R. 80. Finally, in January 2011—more than two years after petitioner first sought to transfer his ownership interest in the firearms—the FBI issued its final decision denying his appeal. App., *infra*, 11a.

B. Procedural History

1. After the FBI issued its final decision, the magistrate judge took up petitioner's motion for return of property under Rule 41(g). That rule provides, in relevant part, that "[a] person aggrieved * * * by the deprivation of property may move for the property's return." Fed. R. Crim. P. 41(g). Although recognizing that federal courts were divided on whether "weapons to which a convicted felon has legal title, but not possession, can be sold for the owner's benefit" without constituting constructive possession, App., *infra*, 13a, the magistrate judge recommended denying petitioner relief because it was "bound by *Howell*," *ibid.*, the controlling circuit precedent. "Although the firearms were neither seized from [petitioner], nor constituted contraband, nor were they forfeited [by the government]," *id.* at 13a-14a, *Howell* dictated that "allowing a defendant to transfer the firearms or receive money from their sale would be constructive possession" prohibited by Section 922(g). *Id.* at 12a. The district court adopted the magistrate judge's report and recommendation as the opinion of the court and denied the motion. *Id.* at 5-6a. Petitioner, again proceeding *pro se*, timely appealed.

2. The court of appeals affirmed. App., *infra*, 1a-4a. The court held that granting petitioner's motion and transferring the firearms to third parties would violate 18 U.S.C. § 922(g) by placing him in constructive possession of the firearms he had surrendered to the FBI. *Id.* at 4a. Although acknowledging "cases from other circuit and district courts which afforded defendants relief," *id.* at 3a (citing, *inter alia*, *Zaleski*, 686 F.3d at 90, *Miller*, 588 F.3d at 418, and *Cooper*, 904 F.2d at 302), the court denied relief, concluding that "our decision in *Howell* controls." *Id.* at 4a. Again following *Howell*, the court also

held that "a defendant convicted of a drug offense ha[s] unclean hands to demand return of his firearms even though * * * th[e] defendant did not use those firearms in furtherance of his offense." *Id.* at 4a.

REASONS FOR GRANTING THE PETITION

Courts widely recognize that "[t]he general rule is that seized property, other than contraband, should be returned to its rightful owner once * * * criminal proceedings have terminated." *Cooper*, 904 F.2d at 304 (quoting *United States* v. *Farrell*, 606 F.2d 1341, 1343 (D.C. Cir. 1979) (quoting *United States* v. *La Fatch*, 565 F.2d 81, 83 (6th Cir. 1977))); *United States* v. *Rodriguez-Aguirre*, 264 F.3d 1195, 1212 (10th Cir. 2001) (same; quoting *Cooper*) (collecting cases); *United States* v. *Bein*, 214 F.3d 408, 411 (3d Cir. 2000) (collecting cases); see also *United States* v. *Wilson*, 540 F.2d 1100, 1101 (D.C. Cir. 1976) ("district courts ha[ve] both the jurisdiction and the duty to ensure the return of such property"). Section 922(g) makes it "unlawful for any person * * * who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year * * * to * * * possess * * * any firearm."

There is a deep, acknowledged conflict among the federal courts of appeals and state supreme courts over whether Section 922(g) prevents a court from ordering the government either (1) to transfer a felon's non-contraband firearms to an unrelated third party to whom he has sold them or (2) to sell the firearms for that person's benefit. See *Zaleski*, 686 F.3d at 92-93 (describing federal split); *Miller*, 588 F.3d at 419 (same); Benson, 80 U. Chi. L. Rev. at 1245-1249 (same). This Court's review is urgently needed because this circuit split has "generated a significant amount of litigation," Benson, 80

U. Chi. L. Rev. fat 1245, concerning a common asset held by nearly half of American households, Lydia Saad, *Self-Reported Gun Ownership in the U.S. is Highest Since 1993*, Gallup Politics (Oct. 26, 2011), http://goo.gl/28bQy5—including the families of thousands of newly convicted persons each year. Whether individuals can realize the economic value of these valuable household assets or whether the government can retain firearms indefinitely without due process now depends on the happenstance of geography.

Because the conflict is deep and ultimately implicates constitutional concerns arising under both the Due Process and Takings Clauses, see *Cooper*, 904 F.2d at 304, 305 (holding that those convicted of felonies have "ownership interest" in firearms protected by the Due Process Clause that cannot be extinguished absent forfeiture); *State* v. *Fadness*, 268 P.3d 17, 23 (Mont. 2012) (noting that the government's "continued retention" of property not subject to forfeiture "would constitute a taking without just compensation"), this Court should not delay review. Granting the petition is the only way to bring uniformity to this area of law and settle this recurring and important issue.

I. THE CIRCUITS DISAGREE ABOUT WHETHER SECTION 922(G) EXTINGUISHES ONLY POSSESSORY INTERESTS OR ALL OWNERSHIP INTERESTS IN NON-CONTRABAND FIREARMS

A. Four Federal Circuits Have Held That Section 922(g) Extinguishes All Property Interests In Non-Contraband Firearms

1. The Eighth and Eleventh Circuits have held that when a person is convicted of a felony, Section 922(g) extinguishes not just his possessory interest in all firearms

but effectively all other ownership interests as well. In *United States* v. *Bagley*, 899 F.2d 707 (1990), the Eighth Circuit held that Section 922(g)'s bar against a felon's possession of firearms extended to other ownership interests, including the right to dispose of such property. *Id.* at 708. In just two short sentences of analysis, it rejected the argument that the government could sell the individual's firearms to a third party and give him the money without violating Section 922(g): "Bagley's argument is frivolous. We agree with the district court 'that to allow [Bagley] to reap the economic benefit from ownership of weapons [] which it is illegal for him to possess would make a mockery of the law.'" *Ibid.* (brackets in original). That court revisited the issue in *United States* v. *Felici*, 208 F.3d 667 (2000), but offered scant additional reasoning to support its conclusion. In rejecting the argument that the government could transfer to a third-party trust non-contraband firearms it had seized from a person convicted of a felony, 208 F.3d at 670, the court stated simply that "[s]uch a request suggests constructive possession [and a]ny firearm possession, actual or constructive, by a convicted felon is prohibited by law," *ibid.*

In *United States* v. *Howell*, 425 F.3d 971 (2005), the Eleventh Circuit expressly adopted the Eighth Circuit's reasoning in rejecting the argument that the government could "sell the [non-contraband] firearms" it had seized from a person convicted of a felony "and distribute the proceeds to him." *Id.* at 977. Selling the property for the person's benefit, it held, would amount to giving him "possession, actual or constructive, [which] is prohibited by [Section 922(g).]" *Ibid.* It also held, as an alternative ground, that the individual could not force the government to sell non-contraband firearms because, as a felon,

he had "extremely 'unclean hands.'" *Id.* at 974. "One engaged in * * * criminal conduct," the court concluded, "is hardly entitled to equitable relief." *Ibid.*

2. Two other circuits have adopted the Eighth and Eleventh Circuit's Section 922(g) rationale in unpublished opinions. In *United States* v. *Roberts*, 322 F App'x 175 (2009), the Third Circuit ruled that the government could destroy non-contraband firearms it had seized from a person convicted of a felony rather than return them to his mother for her to sell and use the proceeds to benefit his children. *Id.* at 176. It stated that it was "persuaded by the *Felici* decision" that "because convicted felons are prohibited from possessing guns * * * they are also barred from constructively possessing firearms by transferring them to a third party." *Ibid.* In *United States* v. *Headley*, 50 F. App'x 266 (2002), the Sixth Circuit similarly concluded that because a person convicted as a felon of "tax evasion and * * * student loan fraud" thereby "lacks the power to lawfully possess the firearms himself, he also cannot delegate the authority to possess these firearms to another individual. Thus, Headley could not seek return of the firearms and ammunition nor could he request that they be transferred to a third-party for him." *Id.* at 267 (citation omitted).

B. Three Circuits And The Montana Supreme Court Have Held That Section 922(g) Leaves Non-Possessory Interests In Firearms Intact

1. The Second, Fifth, and Seventh Circuits and the Montana Supreme Court all have held that Section 922(g) extinguishes only a person's *possessory* interest in non-contraband firearms after he has been convicted of a felony, and does not affect any larger ownership interest he may have in them. Closely following the plain language

of Section 922(g), which makes "[i]t * * * unlawful for any person * * * who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year * * * to * * * *possess* * * * any firearm," 18 U.S.C. § 922(g) (emphasis added), these courts have concluded that the provision poses no obstacle to the transfer or sale of such firearms. See *Zaleski*, 686 F.3d at 93 ("The possibility that Zaleski will receive a financial benefit from [the] sale of the firearms and ammunition to compensate him for his nonpossessory property interest in them does not, standing alone, mean that he constructively possesses them."), cert. denied, 133 S. Ct. 554 (2012); *Miller*, 588 F.3d at 420 ("Miller's property interest in the firearms continues even though his possessory interest has been curtailed."); *Cooper*, 904 F.2d at 305 ("Cooper * * * has a constitutionally protected property interest in [his non-contraband] firearms. * * * Cooper's property interest, however, is limited to an ownership interest; as a convicted felon he cannot legally possess the guns."); *Fadness*, 268 P.3d at 20 (noting "prosecutor sought an order giving him the authority to sell [non-contraband firearms] at public sale or auction * * * with the proceeds from the sale to go to Fadness's parents to be held on Fadness's behalf * * * since it is unlawful under 18 U.S.C. § 922(g)(1) for a person[, like Fadness,] who has been convicted in any court of a felony to possess firearms"); *id.* at 29-30 (concluding that firearms may lawfully be transferred to a third party, so long as felon lacks control over them).[2]

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[2] It appears the government has taken inconsistent positions on the lawfulness of transferring firearms. Although the government has in many cases argued that Section 922(g) prevents any sale or transfer of a convicted felon's firearms, in the District of Massachusetts, for example, "the government ha[s] represented that it would surrender

Indeed, the Second and Seventh Circuits have explicitly recognized the circuit conflict and expressly rejected the reasoning of the Eighth and Eleventh Circuits. *Zaleski*, 686 F.3d at 92-93 (discussing conflict and stating that, "[o]n balance, we are persuaded by the Seventh Circuit's reasoning in *Miller*"); *Miller*, 588 F.3d at 419 (noting that Fifth Circuit in *Cooper* "concluded[] to the contrary" of *Felici* and *Howell*, and explaining that "[t]he fifth circuit has the stronger position"). These courts distinguish the possessory interest in firearms, which Section 922(g) extinguishes, from the larger ownership interest, which Section 922(g) leaves intact, recognizing that these interests represent different sticks in the property "bundle."

Both circuits, moreover, expressly reject the Eleventh Circuit's view that the sale of firearms to an independent third party somehow entails constructive possession by the person convicted of a felony. The Second Circuit noted that so long as the transfer "*in fact* strip[s] [the owner] of any power to exercise dominion and control" over the firearms, it "may be approved without running afoul of Section 922(g)(1)." *Zaleski*, 686 F.3d at 93. The Seventh Circuit went further to identify "other possibilities," including the government transferring "the firearms in trust to a reliable trustee" and allowing an individual convicted of a felony to gift "the firearms to one of [his] friends or relatives" on the recipient's written understanding that he would not return the guns to the convicted individual's control. *Miller*, 588 F.3d at 419-420; accord *Zaleski*, 686 F.3d at 93.

[seized firearms] to any third party lawfully purchasing them from [a convicted felon]." *United States* v. *LeCedra*, No. 98-1057, 1998 WL 1247097, at *1 (1st Cir. May 28, 1998) (per curiam).

2. The Seventh Circuit noted an additional problem with the Eighth and Eleventh Circuit's position. If transfer to a third party necessarily entails constructive possession by the felon and the government thus cannot give the guns to *anyone*, it will have achieved "the functional equivalent of forfeiture" without having to satisfy any of the numerous safeguards on forfeiture proceedings—including "nullif[ying] the statute of limitations" applicable to such proceedings. *Miller*, 588 F.3d at 419. But as the Seventh Circuit, the Montana Supreme Court, and other courts have recognized, "'due process guarantees' prevent the government from effecting 'de facto forfeitures of property by retaining items indefinitely,'" and "'[o]ther courts have likened continued retention of evidence as a taking without just compensation.'" *Fadness*, 268 P.3d at 29 (quoting *Lee* v. *City of Chicago*, 330 F.3d 456, 466 & n.5 (7th Cir. 2003)).

C. The Circuits Disagree About Whether "Unclean Hands" Prevent Disposition Of Noncontraband Firearms

The Eleventh Circuit's "unclean hands" holding presents a subsidiary conflict that also warrants this Court's review. This rule has been rejected, both implicitly and explicitly, by numerous other courts; indeed, no court of appeals besides the Eleventh Circuit has held that a person's status as a felon gives him unclean hands to seek return of non-contraband property through Rule 41(g). The courts of appeals routinely allow felons to seek the return of non-contraband property through Rule 41(g) provided they meet applicable requirements. See, *e.g.*, *Savoy* v. *United States*, 604 F.3d 929, 939 (6th Cir. 2010) (remanding for determination of whether felon was allowed to possess particular property under state law); *United States* v. *Kriesel*, 604 F.3d 1124, 1126 (9th Cir.

2010) (remanding for determination of whether Rule 41 requirements met); *Miller*, 588 F.3d at 420 (remanding for fashioning of appropriate Rule 41 remedy); *United States* v. *Cardona-Sandoval*, 518 F.3d 13, 18 (1st Cir. 2008) (remanding for determination whether government still held felon's property); *United States* v. *Albinson*, 356 F.3d 278, 284 (3d Cir. 2004) (same); *United States* v. *Rodriguez-Aguirre*, 264 F.3d 1195, 1200 (10th Cir. 2001) (remanding for determination of whether Rule 41 requirements met); *United States* v. *Robinson*, 78 F.3d 172, 175 (5th Cir. 1996) (remanding for determination whether felon received adequate notice); *United States* v. *Giovanelli*, 998 F.2d 116, 119-120 (2d Cir. 1993) (ordering return of money to felon).

Even the Eighth Circuit has rejected the Eleventh Circuit's approach to unclean hands and indeed did so in *Felici*—the very case that first clearly laid out the "constructive possession" theory of Section 922(g). 208 F.3d at 670-671. There, the government argued that someone convicted of a drug felony could not require the government under Rule 41(g) (then Rule 41(e)) to return various drug-related items because his conviction gave him unclean hands and because the items represented derivative contraband of the offense. *Id.* at 670. The court remanded for a hearing under the "limited derivative contraband theory, *i.e.*, that the items sought to be returned were in fact utilized or intended to be utilized by the person who possessed them for the manufacture, storage, or transportation of controlled substances." *Id.* at 671. In doing so, the Eighth Circuit necessarily rejected the government's other theory that felons *necessarily* have unclean hands that bar them from using equitable mechanisms, like Rule 41(g), even when there is no relationship between the property sought and past misconduct. If the

court had not rejected the government's theory, the Eighth Circuit would have had no reason to remand for a determination of the relationship between the property and the offense; under the Eleventh Circuit's rationale, it would have simply affirmed because of the claimant's "unclean hands" as a person convicted of a felony.

This subsidiary disagreement provides an additional reason to grant review in this case, because it would permit the Court to address, in a single petition, *both* issues that potentially could prevent a person convicted of a felony from arranging the sale of noncontraband assets.

II. THE DECISION BELOW IS WRONG

The circuits that have concluded that Section 922(g) prohibits persons convicted of felonies from transferring or selling firearms acknowledge that the provision's textual bar extends only to *possession* of a firearm. App., *infra*, 4a ("We den[y] Rule 41 relief * * * because of the concern with courts violating 18 U.S.C. § 922(g) by delivering *actual or constructive possession* of firearms to a convicted felon.") (emphasis added); *Howell*, 425 F.3d at 977 ("Even though the defendant's [idea of a proposed sale] is interesting * * * any firearm *possession, actual or constructive*, by a convicted felon is prohibited by law.") (emphasis added); *Felici*, 208 F.3d at 670 (similar); accord *Roberts*, 322 F. App'x at 176 (discussing *Felici*); *Headley*, 50 F. App'x at 266. Those courts err, however, in holding that a court cannot authorize the government to make such a transfer on behalf of the convicted owner without him somehow "possessing" the firearms in the process. In doing so, these courts confuse "possession" with the other incidents of ownership, disregard the language of Section 922(g) and related statutory provisions, and allow the government to effectuate a forfeiture

without having to satisfy any of that procedure's substantive or procedural requirements.

A. The Eleventh Circuit's Rule Confuses Possession Of A Firearm With Other Incidents Of Ownership

This Court has long recognized that when "a federal criminal statute uses a common-law term of established meaning without otherwise defining it, the general practice is to give that term its common-law meaning." *United States* v. *Turley*, 352 U.S. 407, 411 (1957) (citations omitted). Under the common law, a possessory interest commonly entails "[t]he present right to control property, including the right to exclude others, by a person who is not necessarily the owner." *Black's Law Dictionary* 1284 (9th ed. 2009); *Restatement (First) of Prop.: Introduction & Freehold Estates* § 7 (1936) ("A possessory interest in land exists in a person who has * * * a physical relation to the land of a kind which gives a certain degree of physical control over the land, and an intent so to exercise such control as to exclude other members of society in general from any present occupation of the land."). This understanding accords with the courts of appeals' understanding that "possession," including constructive possession, entails "dominion and control" over the property in question. *E.g.*, *United States* v. *Garrett*, 903 F.2d 1105, 1110 (7th Cir. 1990); *United States* v. *Pelusio*, 725 F.2d 161, 167 (2d Cir. 1983); *United States* v. *Laughman*, 618 F.2d 1067, 1077 (4th Cir. 1980); *United States* v. *Craven*, 478 F.2d. 1329 (6th Cir. 1973), abrogated on other grounds by *Scarborough* v. *United States*, 431 U.S. 563 (1977); *United States* v. *Virciglio*, 441 F.2d 1295, 1298 (5th Cir. 1971).

1. The Eleventh Circuit's rule—that the government's sale or transfer of a gun on behalf of an owner who has been convicted of a felony necessarily imputes constructive possession to the owner—violates this well-established understanding. To begin with, the government's transfer to a third party gives the owner no "right to control" or "right to exclude," the two central indicia of possession. While the firearms are in the government's possession, the government, as bailee, enjoys the complete right to control and to exclude others, including the bailor himself. See John D. Lawson, *The Principles of the American Law of Bailments* § 15, at 34 (1895) ("The bailee not having the title, nevertheless has in addition to the possession of the chattel a special, limited or qualified property in it which gives him a right of action against any one, whether the bailor or a stranger, interfering with his possession or doing damage to the bailed article.").[3] The convicted owner enjoys neither: He cannot use the firearms, access them, or decide where they are stored, how they are stored, or how they are maintained. Nor can he stop others whom the government permits from handling them.

Under general principles of law, a bailor can sell the property to a third party during the period of the bailment. See Lawson, *supra*, § 29(9), at 62. When he does, the bailor does not temporarily regain possession in violation of the bailment agreement; throughout the transaction, the bailee retains the same right to control the

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[3] Once the firearms are transferred to a third party, the original owner can exercise no right to control or right to exclude. Only the new owner can by virtue of her newfound full ownership. She alone, not the original owner, can decide when, how, where, and by whom the firearms can be used. The sale has extinguished the original owner's property interest in them.

property and exclude others, including the bailor. *Id.* § 15, at 34. It is black-letter law that a bailment "will not be affected by a sale made by the bailor of his reversionary interest to a third person, for the reason that he can convey no greater interest than he possesses, and has not, during the bailment, a present right of possession." *Id.* § 29(9), at 62. That the convicted owner receives money from the sale (either through the government as intermediary or directly from the new owner) makes no difference to this analysis. His receipt of the proceeds gives him no right to control or right to exclude. The new owner gains these possessory rights and, in any event, she receives possession from the government, not the original owner. Although the sale transfers the possessory rights of control and exclusion from the government to the third party, at no time does the original owner enjoy the power to exercise either. He simply gains no constructive possession.

This conclusion is confirmed by examining another common situation of divided possession and ownership, a standard landlord-tenant lease. In it, the landlord who owns the property grants the right of possession to the tenant for a period of time. The owner no longer enjoys the right to possess and, indeed, the tenant (subject to certain express or implied contractual conditions) can even exclude the owner. *Restatement (Second) of Prop.: Land. & Ten.* § 1.2 cmt. a (1977). The owner typically retains the right to sell the property subject to the lease. *Id.* § 15.1. But in the process of selling the property then in possession of the tenant, the landowner does not, even temporarily, regain possession in violation of the tenant's rights under the lease. See *id.* § 15.2 cmt. a ("The enjoyment by the tenant of his rights and expectations under the lease usually does not depend significantly on the

landlord continuing to own his reversionary interest in the leased property.").

Although the courts on this side of the split have concluded that transfer or sale to a third party "suggests constructive possession," *Felici*, 208 F.3d at 670, none has explained exactly when (or *how*) the owner would enjoy constructive possession. They cannot articulate the point in the transaction where the convicted owner attains possession *because he never does*. At no point during the transfer of possession of the firearm, during the receipt of payment or its transfer to the original owner, does the felon control the firearm or have the right to exclude others from using them.

The Eleventh Circuit's mistaken conclusion that such transfer fleetingly provides the convicted owner constructive possession effectively destroys all his remaining nonpossessory interests in the property. Under this mistaken understanding, a person convicted of a felony cannot exercise his ultimate right in the property—the right to sell it—without violating the law's ban on the lesser right of possession. The rule effectively transforms a ban on possession into a ban on ownership and, in so doing, violates both well-understood notions of property and Congress's intent.

2. The Eleventh Circuit's bootstrapping of possession into ownership cannot be squared with Congress's careful statutory scheme. As this Court has recognized, possession is just one stick in the "bundle" of property rights, see *United States* v. *Craft*, 535 U.S. 274, 278 (2002), and this Court has distinguished possession, in particular, from the rights to use and dispose of property, *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) ("Property rights in a physical thing have been

described as the rights to possess, use and dispose of it.") (internal quotation marks omitted). Congress has observed these distinctions in its regulation of firearms. Section 922(j), for example, which appears in the same U.S. Code provision at issue in this case, makes it "unlawful for any person to receive, *possess*, conceal, store, *barter*, *sell*, or *dispose of* any stolen firearm." 18 U.S.C. § 922(j) (emphasis added). By distinguishing between possessing a firearm, and "barter[ing], sell[ing], or dispos[ing] of" it, Congress clearly indicated that a prohibition on possessing a firearm does not itself forbid disposing of it; by the same token, Section 922(g)'s prohibition on "possession" of a firearm by a felon does not include non-possessory incidents of ownership.

Congress expressly distinguished between possession and ownership in a number of related statutes. Section 931(a), for example, makes it unlawful for a convicted felon "to purchase, *own*, or *possess* body armor." *Id.* § 931(a) (emphasis added). Section 924(d)(1) similarly provides, in relevant part, that when someone has forfeited guns allegedly involved in certain crimes, that "upon acquittal of the *owner* or *possessor* * * *, the seized or relinquished firearms or ammunition shall be returned forthwith to the *owner* or *possessor*." *Id.* § 924(d)(1) (emphasis added). Both of those provisions are in the same Chapter as Section 922(g). Section 229(a)(1) likewise makes it a crime to, among other things, "*own*, *possess*, or use * * * any chemical weapon." *Id.* § 229(a)(1) (emphasis added). Section 229B(a) correspondingly provides that any person convicted under § 229A(a) must "forfeit * * * any property, real or personal, *owned*, *possessed*, or used by a person involved in th[at] offense." *Id.* § 229B(a) (emphasis added).

Clearly, Congress understands the difference between ownership and possession and has used each term deliberately with its specific meaning in mind. As this Court has noted, "[w]here Congress includes particular language in one section of a statute but omits it in another section * * * , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Nken* v. *Holder*, 556 U.S. 418, 430 (2009) (internal quotation marks omitted). Congress's decision in drafting Section 922(g) to bar possession but not ownership, transfer, or sale means it intended to do just that—and no more. "[C]ourts must presume that [the] legislature says in a statute what it means and means in a statute what it says." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992). The broad interpretation of "possession" embraced by the Eighth and Eleventh Circuits would render superfluous all of the other terms Congress explicitly included in these other provisions embracing the other incidents of ownership. But see *Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." (quoting 2A N. Singer, *Statutes and Statutory Construction* § 46.06, at 181-186 (rev. 6th ed. 2000)).

Finally, prohibiting those convicted of felonies from transferring their firearms to third parties does nothing to advance the recognized purpose of Section 922(g), to "keep guns out of the hands of those who have demonstrated that they may not be trusted to possess a firearm without becoming a threat to society." *Small* v. *United States*, 544 U.S. 385, 393 (2005) (internal quotation marks omitted). Allowing such transfers poses no risk of putting firearms back in the hands of convicted persons; it

merely allows them to dispose of their remaining property interests.

B. The Eleventh Circuit's Rule Raises Constitutional Concerns

1. The Eleventh Circuit's rule is erroneous for a second reason: It allows the government to effectively extinguish all of an owner's interests in his property without having to satisfy any of the strict substantive and procedural requirements for forfeiture. It is undisputed that by receiving the firearms from petitioner in accordance with the magistrate judge's request, the government acquired no ownership interest in petitioner's firearms. App., *infra*, 14a. But the Eleventh Circuit's rule not only prevents a felon from *possessing* firearms, it also prevents him from lawfully renting, selling, or otherwise transferring them to anyone else, or even realize the value of their sale. That, however, effectively extinguishes all of petitioner's interests in his property, rendering the property utterly without economic value to him.

The Eleventh Circuit's interpretation allows the government to effectively extinguish all of petitioner's interests in the property without satisfying any of the requirements the constitution, statutes, and federal rules establish for forfeiture. In particular, the Eleventh Circuit's rule allows the government to dispense with giving notice and a hearing, as due process ordinarily requires, *United States* v. *James Daniel Good Real Prop.*, 510 U.S. 43 (1993), and the government no longer needs to grant the owner an opportunity to show that the deprivation of all his ownership interests is excessive under the Eighth Amendment, see *Austin* v. *United States*, 509 U.S. 602 (1993). Nor does the government

have to show that the guns have some connection to a criminal act, see 18 U.S.C. § 924(d)(1), or that they were purchased with criminal proceeds, 18 U.S.C. § 981(a)(1). It can, in fact, accomplish the equivalent of forfeiture without having to satisfy § 924(d)(1)'s strict 120-day statute of limitations or observing any of the other procedural safeguards imposed by Rule G of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions.

The government has, in fact, effectively achieved "the functional equivalent of forfeiture" (*Miller*, 588 F.3d at 419) without affording petitioner *any* process. That itself "raise[s] a multitude of constitutional problems" counseling against the Eleventh Circuit's broad reading of the statute. *Clark* v. *Martinez*, 543 U.S. 371, 380-381 (2005). If, as this Court has noted, forfeiture proceedings implicate the Due Process Clause of the Fifth Amendment, see, *e.g.*, *United States* v. *$8,850 in U.S. Currency*, 461 U.S. 555 (1983), seizing noncontraband property without any process implicates due process concerns *a fortiori*, see, *e.g.*, *Cooper*, 904 F.2d at 304. The courts have recognized likewise that when the government "effect[s] a *de facto* forfeiture by retaining the property seized indefinitely" its "continued retention * * * constitute[s] a taking without just compensation." *United States* v. *Premises Known as 608 Taylor Ave., Apartment 302, Pittsburgh, Pa.*, 584 F.2d 1297, 1302 (3d Cir. 1978); accord *Fadness*, 268 P.3d at 29 (same); *Lee* v. *City of Chicago*, 330 F.3d at 466 & n.5 (same); see also *Andrus* v. *Allard*, 444 U.S. 51, 65-66 (1979) (suggesting that the "denial" of the full "bundle" of property rights constitutes a taking). Furthermore, a continued holding of property may "constitute both a seizure and a taking,"

raising Fourth Amendment concerns as well. *Presley* v. *City of Charlottesville*, 464 F.3d 480, 485 (4th Cir. 2006).

This approach fundamentally conflicts with this nation's long recognition of citizens' economic interest in firearms. Even during the Revolution, when the Continental Congress authorized the seizure of weapons held by Loyalists, it required that "the arms when taken be appraised by indifferent persons, and such as are applied to the arming the continental troops, be paid for by Congress, and the residue by the respective assemblies, conventions, or councils, or committees of safety." 4 *Journals of the Continental Congress, 1774–1789*, at 201-205 (Washington, D.C.: Government Printing Office 1906). Contemporaneous state law likewise required compensation for arms taken from private persons. See, *e.g.*, An Act for Providing Against Invasions and Insurrections, 1777 Va. Acts ch. VII, *reprinted in* 9 *Hening's Statutes at Large* 291 (1821) (directing that any arms taken for temporary state use and lost or damaged be paid for).

2. Finally, the government's broad understanding of "possession" unnecessarily raises Second Amendment issues by placing petitioner and many thousands of others in a "cruel trilemma." Cf. *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 55 (1964). Under the government's theory of possession, a firearm owner charged with a non-violent felony has three bad options: voluntarily deliver her firearms to the government when accused and receive no compensation if convicted of the felony; sell or give away the firearms when accused, leaving her unable to protect herself or her family pending trial; or keep the firearms once accused and face instantaneous liability under Section 922(g) upon conviction. See *United States* v. *Casterline*, 103 F.3d 76, 79 (9th Cir. 1996) ("If owner-

ship were equated with possession, then one charged with a first felony, who had pawned his guns or otherwise put them out of his possession and control, but retained title, would automatically commit a second felony the moment he was adjudged guilty."). In other words, the government's position burdens a gun owner accused of a crime even if he is eventually acquitted. Construing "possession" in its traditional, common-law sense thus avoids several constitutional difficulties.

C. The Eleventh Circuit's "Unclean Hands" Rationale Does Not Support Denying Relief Absent Wrongdoing Related To The Property

The Eleventh Circuit's alternative holding—that, as someone convicted of a felony, petitioner had "unclean hands" and thus was disqualified from seeking any equitable relief under Rule 41(g)—fares even worse under scrutiny. This Court has squarely held that the unclean hands doctrine applies "only where some unconscionable act of one coming for relief has *immediate and necessary relation to the equity that he seeks in respect of the matter in litigation.*" *Keystone Driller Co.* v. *Gen. Excavator Co.*, 290 U.S. 240, 245 (1933) (emphasis added); 1 Joseph Story & W.H. Lyon, *Commentaries on Equity* § 100 at 101 (14th ed. 1918); see also 2 John Norton Pomeroy, *A Treatise on Equity Jurisprudence* § 399 at 94-95 (Spencer W. Symons ed., 5th ed. 1941). Thus the doctrine of unclean hands "does not go so far as to prohibit a court of equity from giving its aid to a bad or a faithless man *or a criminal*," 2 Pomeroy § 399, at 97 (emphasis added), and "[e]quity does not demand that its suitors shall have led blameless lives," *Loughran* v. *Loughran*, 292 U.S. 216, 229 (1934). "[C]ourts of equity," in short, "do not make the quality of suitors the test." *Keystone Driller*, 290 U.S. at 245.

No other court of appeals has endorsed the Eleventh Circuit's expansive view of the unclean hands doctrine and most have at least implicitly rejected it. See, pp. 11-13, *supra*. While courts occasionally use the language of unclean hands to deny Rule 41(g) relief to persons convicted of crimes, they do so only when they seek the return of derivative contraband related to the offense. See, *e.g.*, *United States* v. *Kaczynski*, 551 F.3d 1120, 1129–1130 (9th Cir. 2009). Denying Rule 41(g) relief in such cases is logical, because the actor's past criminal conduct "has [an] immediate and necessary relation to the equity that he seeks in respect of the matter in litigation." *Keystone Driller*, 290 U.S. at 245.

No such connection exists here. It is undisputed that the firearms at issue are not derivative contraband. Petitioner did not use a firearm—much less his entire collection of firearms—in committing the drug distribution offense to which he pleaded guilty. See App., *infra*, 4a ("[petitioner] did not use those firearms in furtherance of his offense"), 13a-14a. Nor is there any evidence that he used any proceeds from marijuana sales to purchase them. The Eleventh Circuit based its holding of unclean hands solely on petitioner's status as a felon, App., *infra*, 4a, directly violating "[t]he general rule * * * that seized property, other than contraband, should be returned to its rightful owner once * * * criminal proceedings have terminated." *Cooper*, 904 F.2d at 304.

Taken to its logical conclusion, the Eleventh Circuit's rule would foreclose courts from *ever* considering a claim for return of property to someone convicted of a crime. The government could seize or hold property belonging to a person convicted of an offense knowing that he would have no status to invoke the courts' equitable powers to return it. It could thus impose upon a felon or even a

misdemeanant an additional punishment beyond that imposed by law. Indeed, the Eleventh Circuit's rule would bar anyone convicted of a crime from invoking equity even against private individuals. That would be tantamount to outlawry. But this Court has held that claimants cannot be foreclosed from litigating their rights to property based on far more compelling claims of misconduct, including rebellion against the United States. See *Degen* v. *United States*, 517 U.S. 820, 828 (1996) (citing *McVeigh* v. *United States*, 78 U.S. 259, 268 (1870)). As noted there, foreclosing a person from litigating their rights to property because of misconduct unrelated to the property is "an arbitrary response to the conduct it is supposed to * * * discourage." *Ibid.*

The Eleventh Circuit's narrow application of its "unclean hands" rule appears to reflect an appreciation of its flaws: Besides *Howell*, 425 F.3d at 974, and the decision below, the court has never applied the rule to non-contraband goods other than firearms. Indeed, it routinely allows felons to invoke Rule 41(g) in seeking the return of noncontraband property from the government. See, *e.g.*, *United States* v. *Melquiades*, 394 F. App'x 578, 579-580 (11th Cir. 2010). The Eleventh Circuit's inconsistent approach reflects little faith in the validity of its rule.

III. THIS RECURRING ISSUE IS OF NATIONAL IMPORTANCE

Whether persons convicted of felonies retain any nonpossessory ownership interest in their firearms and can receive the proceeds from their sale are recurring questions of great practical importance. One in three Americans and almost half of American households own a firearm. See Saad, *supra*. And in 2006 alone, there were more than 1,200,000 felony convictions, U.S. Dep't of

Justice, Bureau of Justice Statistics, *Felony Sentences in State Courts, 2006—Statistical Tables*, Table 1.1; *id.*, Table 4.2. Under the Eleventh Circuit's rule, an individual convicted of a felony may effectively lose all property interests in any firearms he owns (including nonpossessory interests), without any compensation whatsoever. The rule deprives such persons of the complete economic value of their firearms.

Firearms represent significant household assets. One commenter estimates the cost a handgun—one of the least expensive types of firearms—with associated ammunition and equipment at $ 714. Dan Zimmerman, *The True Cost of Buying a Handgun*, The Truth About Guns (Oct. 20, 2013), http://goo.gl/vzrcV8. That sum represents two-thirds of the typical American household's monthly discretionary income.[4] Furthermore, many individuals purchase firearms as an investment, as "firearms [never] do anything but increase in value." Joe Mont, *Want Bang for Your Buck? Invest in Guns*, MSN Money (Apr. 13, 2011), http://goo.gl/ocPLNu. Those who own firearms tend to own several. Allison Brennan, *Analysis: Fewer U.S. gun owners own more guns*, CNN (July 31, 2012), http://goo.gl/0TCWA6.

Gun collections represent significant assets: Even gun collections consisting only of ordinary, functional pieces (rather than valuable antiques) routinely attain values of thousands of dollars, if not tens of thousands of dollars. *E.g.*, Larry Fitzpatrick, *No Heirs Found for Springfield Man Who Died Leaving Valuable Gun Collection*, Oregon Herald (May 11, 2012), *available at*

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[4] The typical American household has $12,800 in annual discretionary spending. Experian, *The 2011 Discretionary Spend Report* 3 (2011).

http://goo.gl/huSCek (reporting "a gun collection worth about half a million dollars"). The cases involved in the circuit split reflect that fact: In one case, the Government sold the firearm collection for over $30,000, see *Cooper*, 904 F.2d at 304, and, in another, seized a collection valued at over $100,000, see *Zaleski*, 686 F.3d at 91. Sizable collections are present in many of the other cases involved in the split. *E.g.*, *Miller*, 588 F.3d at 418 (34 firearms); *Headley*, 50 F. App'x at 267 (14 firearms); *Roberts*, 322 F App'x at 176 (10 firearms); Notice and Motion for Court Order to Return Personal Property 4, *United States* v. *Brown*, No. 1:06-cr-0071-SM (D.N.H. filed Oct. 16, 2006), ECF No. 65 (30 firearms). The fifteen firearms involved here, see note 1, *supra*, are typical.

Firearms, and firearm collections, represent significant economic assets given that median per capita annual income is $28,051. U. S. Census Bureau, *State & County Quickfacts*, http://goo.gl/35WxM8 (last visited Apr. 26, 2014). The proceeds from selling a collection of the size at issue here could easily cover several months' rent or mortgage payments,[5] or cover months of grocery bills.[6]

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[5] See RealtyTrac, *Monthly House Payments for Homebuyers Increase an Average 21 Percent from a Year Ago in 325 U.S. Counties* (Feb. 21, 2014), http://goo.gl/ZOLR38 (average payment for house purchased in late 2013 was $865, up from $714 previous year); see also Sam Ro, *How Rent Became More Expensive Than Mortgage Payments*, Business Insider (Jan. 8, 2013), http://goo.gl/GFqbLr (noting fourth quarter 2012 figures showing average rent at $718, average mortgage payment $481).

[6] Elizabeth Mendes, *Americans Spend $151 a Week on Food; the High-Income, $180*, Gallup (Aug. 2, 2012), http://goo.gl/gEjG3o; USDA, *Official USDA Food Plans: Cost of Food at Home at Four Levels, U.S. Average, March 2014*, http://goo.gl/Yzoggg.

Depriving those convicted of felonies of the value of their firearms affects not only the person convicted—it also deprives their dependents of an important source of income, particularly during the period of imprisonment, when the person convicted is no longer able to contribute their wages to household income. Persons convicted of offenses often seek to use the proceeds to support dependents during the time of their incarceration. *E.g.*, *Roberts*, 322 F. App'x at 176 (unsuccessfully seeking authorization that defendant's "mother be permitted to sell the firearms and keep the proceeds to benefit his children"). Others use the proceeds as a nest egg to help them to make a fresh start after completing their prison sentence. *E.g.*, *Fadness*, 268 P.3d at 21 (defendant seeking to sell firearms for use to pay rent deposit and "try to get started on my own again" after prison). Thus, seizing firearms unconnected to an offense and prohibiting the owner from selling them can impose serious hardship on innocent members of the owner's household and other dependents.

IV. THIS CASE REPRESENTS AN IDEAL VEHICLE FOR RESOLVING THE CONFLICT

This case presents a particularly favorable vehicle for addressing this recurring issue because it arises from the Eleventh Circuit. Because the Eleventh Circuit—alone among the courts of appeals—holds that *both* Section 922(g) and the doctrine of unclean hands bar the government from selling or transferring firearms owned by a felon for his economic benefit, this case allows this Court to resolve in a single petition both asserted obstacles to permitting a person convicted of a felony from transferring his firearms. If this Court were to grant review in a case coming from any other circuit to address the meaning of Section 922 and concluded that

the provision does bar such transfers, a conflict would still remain on the unclean hands issue. Thus, in the Eleventh Circuit alone, government sale or transfer would still be barred by the convicted owner's unclean hands. In other words, this Court can bring national uniformity to this important issue only in a case arising from the Eleventh Circuit.

This case represents an ideal vehicle in other respects as well. Because the Eleventh Circuit squarely held that petitioner "did not use th[e] firearms in furtherance of his offense," App., *infra*, 4a, they clearly are not contraband subject to forfeiture or traditional unclean hands analysis, see pp. 26-28, *supra*. There are also no outstanding factual issues bearing on the case's outcome. Applying the correct legal rule would be dispositive of the whole case.

* * * * *

Whether a felon can receive the proceeds of a sale of non-contraband firearms in the government's possession now depends solely on geography. Every circuit to have decided the issue in the last decade has expressly recognized and discussed the conflict, App., *infra*, 3a; *Zaleski*, 686 F.3d at 92-93; *Miller*, 588 F.3d at 419; *Howell*, 425 F.3d at 976, only to see it proliferate further. The uncertainty is both deep and pervasive and has "generated a significant amount of litigation," Benson, 80 U. Chi. L. Rev. at 1245, about significant and valuable household assets. Further review is urgently warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2014

APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 12-14628
Non-Argument Calendar

D.C. Docket No. 3:06-cr-00211-TJC-TEM-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TONY HENDERSON, a.k.a. Hollywood,

Defendant-Appellant.

Appeal from the United States District Court
For the Middle District of Florida

(January 28, 2014)

Before PRYOR, MARTIN, and JORDAN, Circuit Judges.

PER CURIAM:

Tony Henderson, a former federal prisoner and current convicted felon, appeals from the district court's denial of his motion for return of property, namely, nineteen firearms that he voluntarily surrendered to the United States. After review of the parties' briefs and the

record, we affirm.

Mr. Henderson, who was once a United States Border Patrol Agent, was charged with, among other crimes, the distribution of marijuana, in violation of 21 U.S.C. § 841(a)(1). On June 9, 2006, two days after he was arrested, Mr. Henderson voluntarily surrendered nineteen firearms to the Federal Bureau of Investigation. Though Mr. Henderson's conditions of bond required him to surrender "law enforcement firearms and credentials," D.E. 8 at 2, Mr. Henderson maintained that he surrendered the nineteen personal firearms to the FBI for "safekeeping as a condition of the bond" because "the judge felt that [he] was a suicide risk." D.E. 182 at 11. Mr. Henderson eventually pled guilty to the narcotics charge, and he became a convicted felon upon his adjudication of guilt on December 6, 2007.

The FBI refused to return the firearms after Mr. Henderson proposed to transfer them to a purported buyer in 2008, and another in 2009. Mr. Henderson moved the district court under Fed. R. Crim. P. 41(g) to allow him to transfer ownership to the 2009 buyer or to his wife. The magistrate judge, relying on 18 U.S.C. § 922(g) and our decision in *United States v. Howell*, 425 F.3d 971 (11th Cir. 2005), recommended denial of the motion because Mr. Henderson was a convicted felon. The district court adopted the recommendation, and denied Mr. Henderson's Rule 41 motion. This appeal followed.

In *Howell*, we affirmed the denial of a convicted felon's Rule 41 motion for return of firearms because § 922(g) made the felon unable to possess the firearms (actually or constructively) lawfully. *See* 425 F.3d at 976–77 (citing *United States v. Felici*, 208 F.3d 667, 670 (8th Cir. 2000)).

We review questions of law dealing with the district court's denial of a Rule 41(g) motion *de novo*, and we review findings of fact for clear error. *See Howell*, 425 F.3d at 973. A Rule 41(g) movant must show a possessory interest in the property held by the government, and because a Rule 41(g) motion is one in equity, courts will weigh "all equitable considerations in order to make a fair and just decision." *Id.* As a result, a Rule 41(g) movant must come to the court with clean hands. *See id.*

On appeal, Mr. Henderson raises the same arguments he presented to the district court.[1] He argues that the FBI's failure to provide him, and his wife and family, with any notice of his disqualification of firearm ownership as a felon prior to his adjudication of guilt affords him relief legally and equitably. Mr. Henderson argues that *Howell* does not apply because in that case the government provided the defendant with notice of seizure by including the word "seized" on the defendant's property receipt. Mr. Henderson invites us instead to rely on cases from other circuit and district courts which afforded defendants relief under circumstances he argues are similar to his. *See* Appellant's Br. at 10–11 (citing *Cooper v. Greenwood*, 904 F.2d 302 (5th Cir. 1990); *United States v. Miller*, 588 F.3d 418 (7th Cir. 2009); *United States v. Zaleski*, 686 F.3d 90 (2d Cir. 2012); *United States v. Brown*, 754 F. Supp. 2d 311 (D.N.H. 2010)).

We decline this invitation because, like the district

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[1] Mr. Henderson also argues, for the first time on appeal, that several of the nineteen firearms are not covered by 18 U.S.C. § 922(g). We do not address this argument because he did not present it below. *See Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998) ("*Pro se* pleadings are held to a less stringent standard than pleadings drafted by attorneys. . . . But, issues not raised below are normally deemed waived.") (citations omitted).

court, we find that our decision in *Howell* controls. We denied Rule 41 relief in *Howell* because of the concern with courts violating 18 U.S.C. § 922(g) by delivering actual or constructive possession of firearms to a convicted felon. The method in which the government obtained the firearms was immaterial. *See Howell*, 425 F.3d at 976–977. The fact that the government acquired Mr. Henderson's firearms because of a voluntary surrender pursuant to a judge's concern for his safety does not alleviate the concern that by granting Mr. Henderson actual or constructive possession of a firearm, a court would violate § 922(g). *See id.* at 976 ("Requiring a court to return firearms to a convicted felon would not only be in violation of federal law, but would be contrary to the public policy behind the law."). Similarly, we see no reason to hold in this case that the FBI was required to provide notice to Mr. Henderson about § 922(g), as Mr. Henderson acknowledged in his plea agreement that as a felon he would be deprived of the right to possess firearms. *See* D.E. 128 at 8.

Further, Mr. Henderson's equitable argument rings hollow. We held in *Howell* that a defendant convicted of a drug offense had unclean hands to demand return of his firearms even though, as with Mr. Henderson, that defendant did not use those firearms in furtherance of his offense. *See Howell*, 425 F.3d at 974.

In sum, because Mr. Henderson cannot possess firearms as a convicted felon, and because he seeks equitable relief with unclean hands, we affirm the denial of his Rule 41(g) motion.

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES
OF AMERICA

vs.

CASE NO. 3:06-cr-211-J-32TEM

TONY HENDERSON

ORDER

This case is before the Court on Defendant's Motion to Return/Disposition of Property (Doc. 155), Defendant's Renewed Motion for Return of Property (Doc. 162), Defendant's Renewed Motion for Return of Property (Doc. 163) and Defendant's Renewed Motion to Return/Disposition of Property (Doc. 165), to which the United States has filed a response (Doc. 159). The Magistrate Judge held a hearing on May 16, 2011, following which the Magistrate Judge entered a Report and Recommendation (Doc. 169) recommending that the Motions be denied. Defendant objected to the Report and Recommendation (Doc. 170) and the government did not respond to the objections. Having now conducted a *de novo* review, it is

ORDERED:

1. Defendant's Objections to Report and Recommendation (Doc. 170) are **OVERRULED.**

2. The Report and Recommendation (Doc. 169) is **ADOPTED** as the opinion of the Court.

3. Defendant's Motion to Return/Disposition of Property (Doc. 155) is **DENIED**.

4. Defendant's Renewed Motion for Return of Property (Doc. 162), Defendant's Renewed Motion for Return of Property (Doc. 163) and Defendant's Renewed Motion to Return/Disposition of Property (Doc. 165) are **DEEMED MOOT**.

DONE AND ORDERED in Jacksonville, Florida, this 8th day of August, 2012.

/s/
TIMOTHY J.CORRIGAN
United States District Judge

md.
Copies to:
Hon. Thomas E. Morris, U.S. Magistrate Judge
Russell C. Stoddard, AUSA
U.S. Probation
Defendant

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES
OF AMERICA

vs.

CASE NO. 3:06-cr-211-J-32TEM

TONY HENDERSON

REPORT AND RECOMMENDATION[1]

This case is before the Court on Defendant Tony Henderson's (hereinafter referred to as "Petitioner" or "Henderson") Motion to Return/Disposition of Property (Doc. #155), and the United States' response in opposition (Doc. #159).[2] The property in issue consists of nineteen (19) firearms that were turned over to the Federal Bureau of Investigation (FBI) by the Petitioner shortly after his arrest in the case, as a condition of bond for pretrial release. Henderson was originally arrested on a controlled substance charge, which was alleged by a complaint. Subsequently, an initial indictment and two

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[1] Within fourteen (14) days after service of this document, specific, written objections may be filed in accordance with 28 U.S.C. § 636, Rule 59, Federal Rules of Criminal Procedure, and Rule 6.02, Local Rules, United States District Court, Middle District of Florida. Failure to file a timely objection waives a party's right to review. Fed. R. Crim. P. 59.

[2] The Court recognizes Petitioner filed three renewed motions for return of this same property, during which time the FBI investigation continued (*see* Docs. #162, #163, #165).

superceding indictments were returned against him (*see* Docs. #15, #34, #89). Each indictment contained a forfeiture provision seeking forfeiture of a house owned by Petitioner and his wife, but none of the indictments sought forfeiture of the firearms.

On November 30, 2007, Henderson pled guilty to a drug charge pursuant to a plea agreement (Doc. #128). He was adjudicated guilty on December 6, 2007 (Doc. #129). Thus, Henderson became a convicted felon as of December 6, 2007. Henderson was sentenced on April 21, 2008 (*see* Docs. #144, #146). Forfeiture was not pursued as to the house or other property.

Since Henderson was convicted of a felony, more than a year after his surrender of the firearms, and the relief sought by the instant motion requests the firearms be given to either his wife or Mr. Robert Rosier, the Court finds Henderson's motion implicitly recognizes it would be illegal to return the firearms to him. Petitioner states in his motion that he transferred his "non-possessory" interest in the firearms to Mr. Robert Rosier on February 4, 2009, and that Mr. Rosier had filed a claim for the firearms which the FBI denied. In the instant motion, Petitioner also stated that he had filed an appeal of the denial to return with the FBI on June 3, 2010, but no decision had been made by the FBI when the motion was filed.

The United States opposes the relief sought by Petitioner, claiming to grant the motion would give Henderson constructive possession of the weapons, which is against the law (*see generally*, Doc. #159).

Previously, the Court took the matter under advisement, requiring "[t]he parties shall provide the Court a copy of the final agency action once they receive

it. Once the United States receives the final decision of the agency, it shall ensure that the firearms are not sold or destroyed until the Court has issued its Order in the matter." (Doc. #160, Court Order.) The following chronology of Henderson's efforts to obtain release of the firearms is based on the exhibits he introduced at a hearing on May 16, 2011, as well as his testimony at the hearing:[3]

1. On June 12, 2006, an FBI agent sent a detailed list of the firearms by facsimile to attorney Alexander Christine, Jr., (Ex. 2).[4] The cover sheet contains a handwritten note referring to a proffer, "hopefully" to occur that day.

2. On June 13, 2008, attorney Mark Rosenblum wrote a letter to the United States Attorney's office asking what steps could be taken to transfer the firearms (Ex. 1). No reply was received.

3. In November 2008, Defendant claims he contacted the FBI seeking to transfer possession and ownership of the firearms and was advised to submit a letter and "bill of sale" (Doc. #165, paragraph 7).

4. On December 1, 2008, Defendant signed a bill of sale transferring the firearms to William Boggs (Ex. 3).

5. In December 2008, Defendant telephoned the FBI to inquire about obtaining the transfer of the firearms.

6. On December 17, 2008, Defendant wrote a letter

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[3] The non-transcribed recording of the hearing is hereby incorporated by reference. The parties may contact the Courtroom Deputy of the undersigned if a transcript of the hearing is desired.

[4] Mr. Alexander R. Christine, Jr., represented Henderson in this case until he was given leave to withdraw on September 6, 2006 (*see* Doc. #26).

to the agent in charge of the Jacksonville FBI office, advising the FBI he had transferred possession and ownership of the firearms to Boggs and asking when the actual transfer of the property could be accomplished (Ex. 3).

7. On March 2, 2009, Defendant wrote a letter to the FBI advising that Mr. Boggs had decided not to take possession and ownership of the firearms; instead, Mr. Robert Rosier would take them (Ex. 4). A bill of sale dated February 2, 2009, from Henderson to Rosier, was attached to the letter. Notably, the bill of sale contains language that the seller certifies, "He is legally entitled to sell and/or transfer title of his firearms" (Ex. 4 at 2).

8. On April 6, 2009, Defendant wrote a followup letter to the FBI, again asking about a transfer of the guns to Mr. Rosier (Ex. 5).

9. After four unsuccessful attempts from April 2009 through June 2009, to contact an agent with knowledge of the firearms by telephone, on December 14, 2009, Henderson apparently talked with "Agent Ubanks" by phone and then wrote a letter memorializing the conversation and asking for a telephone call from someone with authority to act (Ex. 6).

10. On December 16, 2009, the special agent in charge of the FBI office in Jacksonville wrote a letter to Defendant stating that the firearms had been "seized" by the Federal Bureau of Investigation on June 9, 2006, and advising Henderson of a procedure under Title 41, U.S.C. § 128-48, 102-1, in which he could attempt to claim the firearms (Ex. 8).

11. On December 28, 2009, Defendant wrote a letter to the FBI claiming the firearms for Mr. Rosier (Ex. 9).

12. Also on December 28, 2009, Mr. Rosier sent the

FBI a letter claiming he had purchased the firearms from Henderson to help Henderson and his family with their financial situation (Ex.10).

13. On January 5, 2010, the FBI wrote to Henderson, advising it had received Henderson's "January 4, 2010" claim for the weapons and would conduct an investigation (Ex. 7).

14. On May 21, 2010, the FBI wrote Defendant that his claim had been denied and that he could request reconsideration of that decision with ten (10) days (Ex. 11). Also on May 21, 2010, the FBI wrote to Mr. Rosier stating his claim to the firearms that had been filed on December 30, 2009 was denied and he had ten (10) within which to request reconsideration (Ex. 12).

15. On June 3, 2010, Defendant wrote a letter to the Finance Division of the FBI seeking reconsideration of the initial decision (Ex. 13).

16. On January 26, 2011, the FBI wrote Henderson advising his appeal had been denied as a final decision (Ex. 14).

Analysis:

Henderson's request must be denied under Eleventh Circuit authority. In *United States v. Howell*, 425 F.3d 971 (11th Cir. 2005), a defendant filed a motion under Rule 41(g), Fed. R. Crim. P., to recover cash and firearms after the close of all criminal proceedings in the case. The court treated the motion as a civil motion in equity. The court noted the defendant was the record owner of the firearms, but found that returning firearms to a convicted felon would violate Title 18, U.S.C. § 922(g). The court then noted that to prevail under Rule 41(g), the owner must have "clean hands" under the equitable test, but a

defendant convicted of a drug offense has "unclean hands" and is not entitled to equitable relief. *Id.* at 974.

The *Howell* court also examined whether due process would allow the defendant to designate someone else to receive the firearms or to have the weapons sold and the proceeds provided to him. Relying on an Eighth Circuit opinion, *United States. v. Felici*, 208 F.3d 667 (8th Cir. 2000), the *Howell* court found the defendant could not receive the firearms "either directly or indirectly." *Id.* at 976. The court agreed with the reasoning in *Felici* that the prohibition of a felon possessing firearms applied to either actual or constructive possession and allowing a defendant to transfer the firearms or receive money from their sale would be constructive possession. *Id.* at 976-77.

Although the Court recognizes that the firearms in Henderson's case were surrendered by him as a condition of bail, rather than seized under Rule 41, that difference does not appear significant under *Howell*. "The fact that the defendant was in lawful possession and was not a convicted felon when he acquired the firearms is irrelevant," stated the Eleventh Circuit, noting that section 922(g) was designed to work retroactively to prevent constructive or actual possession of firearms by a convicted felon. *Id.* at 977.[5]

The Seventh Circuit later agreed with the Eleventh Circuit and cited *Howell* in *United States v. Miller*, 588 F.3d. 418 (7th Cir. 2009). A district court in *United States*

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[5] The Eleventh Circuit explicitly declined to express an opinion on whether Howell could file an action under 42 U.S.C. § 1983 for the value of the firearms. *Howell*, 425 F.3d at 977 n.4. This Court similarly declines to express such an opinion. One of the cases upon which Howell relied, *Cooper v. City of Greenwood*, 904 F.2d 302 (5th Cir. 1990), was an action for damages under section 1983.

v. Approximately 627 Firearms, More or Less, 589 F.Supp.2d 1129 (S.D. Iowa 2008), also agreed with the *Howell* conclusion on constructive possession, but found it was not prohibited from ordering the sale of the defendant's personal firearms and distributing the proceeds of the sale to the defendant. *Id.* at 1140. Although the court in *627 Firearms* was ruling on a forfeiture motion in ordering the sale of personal firearms not used in an offense, it relied on *Cooper v. City of Greenwood*, 904 F.2d 302, 306 (5th Cir. 1990), an action under 42 U.S.C. § 1983.

Here, Henderson relies on *United States v. Brown*, 754 F.Supp.2d 311 (D.N.H. 2010), a case which is, admittedly, factually similar to this case. In *Brown*, the firearms in question were surrendered as a condition of release on bail; however, unlike the instant case, the arms were placed in the possession of a dealer rather than a law enforcement agency. *Id.* at 313. Although factually convoluted because of subsequent transfers of the firearms, and a belated attempt by the government to forfeit the firearms, the *Brown* court rejected the idea that continued ownership of firearms after a felony conviction amounts to constructive possession. *Id.* at 314-15. The *Brown* court appears to agree with *627 Firearms* that weapons to which a convicted felon has legal title, but not possession, can be sold for the owner's benefit. *Id.* at 317.

This Court, however, is bound by *Howell*. Although the firearms were neither seized from Henderson,[6] nor

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[6] The FBI did send Mr. Henderson a letter in December 2009 stating that the guns had been seized on June 9, 2006 (*see* Ex. 8). However, no basis for a seizure was provided in the letter. The firearms had been surrendered as a condition of bail. Until Henderson was adjudicated guilty December 6, 2007, he could have

constituted contraband, nor were they forfeited, Henderson did not attempt to transfer ownership of the firearms to another person until *after* he had been adjudicated guilty and was a convicted felon.

For the reasons stated herein, the undersigned respectfully recommends the Motion to Return/Disposition of Property (Doc. #155), filed by former Defendant, Tony Henderson, as a *pro se* litigant, be **DENIED**, and the later motions (Docs. #162, #163, #165) requesting the same relief be **DEEMED MOOT**.

DONE AND ENTERED at Jacksonville, Florida this 27th day of May, 2011.

THOMAS E. MORRIS
United States Magistrate Judge

Copies to:
Honorable Timothy J. Corrigan
Asst. U.S. Attorney (Stoddard)
Tony Henderson, *pro se*

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sought Court approval to have the firearms returned or transferred to another person. Moreover, the regulation cited by the FBI in its letter is an abandonment provision stating that if the owner of the firearms is known, he "shall be notified within 20 days of finding such property" and he would have thirty (30) days from the date of the notification letter to claim the property or the property would vest in the United States. 41 C.F.R. § 128-48.102-1. Since Henderson's cash bail was not exonerated until July 8, 2008 (Doc. #149), the basis for the FBI claim of abandonment is not clear, but there is nothing in the record to indicate the FBI notified Henderson that the firearms had been "seized" prior to the December 2009 letter.

OPPOSITION BRIEF

No. 13-1487

In the Supreme Court of the United States

TONY HENDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, following a felony conviction that precludes actual or constructive firearm possession under 18 U.S.C. 922(g), a defendant is entitled under Federal Rule of Criminal Procedure 41(g) to have non-contraband firearms that were held by the government during the criminal proceedings transferred to a relative or a third party of the defendant's choosing.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 7
Conclusion 18

TABLE OF AUTHORITIES

Cases:

Cooper v. *City of Greenwood*, 904 F.2d 302 (5th Cir. 1990) 15
Quackenbush v. *Allstate Ins. Co.*, 517 U.S. 706 (1996) 10
State v. *Fadness*, 268 P.3d 17 (Mont. 2012) 16
United States v. *Bagley*, 899 F.2d 707 (8th Cir.), cert. denied, 498 U.S. 938 (1990) 12
United States v. *Felici*, 208 F.3d 667 (8th Cir. 2000), cert. denied, 531 U.S. 1201 (2001) 6, 12, 18
United States v. *Headley*, 50 Fed. Appx. 266 (6th Cir. 2002) 13
United States v. *Howell*, 425 F.3d 971 (11th Cir. 2005) 5, 6, 7, 8, 10, 12
United States v. *Miller*, 588 F.3d 418 (7th Cir. 2009) 9, 14, 15
United States v. *Roberts*, 322 Fed. Appx. 175 (3d Cir. 2009) 12
United States v. *Zaleski*, 686 F.3d 90 (2d Cir.), cert. denied, 133 S. Ct. 554 (2012) 9, 13, 14

Constitution, statutes and rule:

U.S. Constitution Amend. XIV (Due Process Clause) 16
Tucker Act:
28 U.S.C. 1346(a)(2) 14

Statutes and rule—Continued: Page

28 U.S.C. 1491 14
18 U.S.C. 922(g) 3, 5, 7, 8, 12
21 U.S.C. 841(a)(1) 2
21 U.S.C. 841(b)(1)(D) 2
21 U.S.C. 843(b) 2
21 U.S.C. 846 2
42 U.S.C. 1983 15
Mont. Code Ann. 46-5-308(1)(e) 16
Fed. R. Crim. P. 41(g) ..... *passim*

In the Supreme Court of the United States

No. 13-1487

TONY HENDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the Federal Reporter but is reprinted at 555 Fed. Appx. 851. The order of the district court (Pet. App. 5a-6a) is unreported. The magistrate judge's report and recommendation (Pet. App. 7a-14a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 2014. On April 17, 2014, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including June 27, 2014. The petition for a writ of certiorari was filed on June 10, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Middle District of Florida, petitioner was convicted on one count of distributing less than 50 kilograms of marijuana, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(D). Judgment 1. He was sentenced to six months of imprisonment, to be followed by two years of supervised release (including four months of home detention). Judgment 2-4. After his conviction, petitioner filed a motion in the district court seeking to control the disposition of firearms that he had surrendered after his arrest as a condition of bond for pretrial release. Pet. App. 2a. Adopting the report and recommendation of a magistrate judge (*id.* at 7a-14a), the district court denied the motion, *id.* at 5a-6a. The court of appeals affirmed. *Id.* at 1a-4a.

1. Between November 2003 and January 2006, petitioner, a United States Border Patrol Agent, sold marijuana to a confidential source on multiple occasions. Gov't C.A. Br. 1; D. Ct. Doc. 89, at 1-6 (Sept. 20, 2007) (Indictment). He was indicted on 11 counts of distributing less than 50 kilograms of marijuana, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(D), of conspiring to distribute less than 50 kilograms of marijuana, in violation of 21 U.S.C. 846, or of using a telephone to facilitate that distribution, in violation of 21 U.S.C. 843(b). Indictment 1-6.

On June 7, 2006, petitioner was arrested and appeared at a bond hearing, at which a magistrate judge ordered, as a condition of his release, that he "immediately * * * surrender all law enforcement firearms and credentials." D. Ct. Doc. 8, at 2 (June 11, 2006); D. Ct. Doc. 182, at 11 (Aug. 12, 2013) (transcript of May 16, 2011 evidentiary hearing). Two days later,

petitioner voluntarily surrendered to FBI agents not only his Border Patrol firearms but also as many as 19 other firearms or weapons. D. Ct. Doc. 182, at 11-12; see D. Ct. Doc. 155, at 9-10 (July 16, 2010) (listing surrendered items).[1] Petitioner later explained that he was motivated to surrender the additional weapons because the judge felt he was "a suicide risk." Pet. App. 2a (quoting D. Ct. Doc. 182, at 12).

On November 30, 2007, petitioner pleaded guilty to one count of distributing marijuana. Pet. App. 2a, 8a. One week later, his plea was accepted and he was adjudicated guilty. *Id.* at 8a. On April 21, 2008, he was sentenced to a six-month term of imprisonment, to be followed by two years of supervised release, including four months of home detention. *Ibid.*; Judgment 2-4.

Between November 2008 and December 2009, petitioner repeatedly contacted the FBI, seeking to have it transfer his personal firearms to two different purported buyers (first a neighbor and later Robert Rosier, a friend from a camping group). Pet. App. 9a-10a;

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[1] Petitioner contends (Pet. 5 n.1) that 3 of the 19 weapons he surrendered are not ones that he would now be barred from possessing under 18 U.S.C. 922(g). Petitioner would also exclude (Pet. 5 n.1) three M4 magazines that were numbered as the nineteenth entry on the FBI's original handwritten inventory (which included two entries numbered "10"). D. Ct. Doc. 155, at 5-6. But those magazines were not included on the FBI's subsequent typewritten list of 19 weapons. D. Ct. Doc. 155, at 9-10. The court of appeals declined to address petitioner's contention that some of the weapons deserved different treatment than others, because petitioner had not raised it in the district court. Pet. App. 3a n.1. As petitioner observes (Pet. 5 n.1), resolution of the question presented in this Court does not turn on the precise number of "firearms" at issue.

D. Ct. Doc. 182, at 15, 25. The "bill of sale" to Rosier apparently contemplated that Rosier would decide what to pay petitioner after he had received the firearms. D. Ct. Doc. 182, at 25.

The FBI declined petitioner's requests to transfer the firearms to either of the individuals petitioner identified and denied petitioner's request for reconsideration of that decision. Pet. App. 2a, 10a-11a; see Gov't C.A. Br. 4-6.

2. On July 16, 2010, petitioner filed in the district court a "Motion for the Return/Disposition of Property," in which he requested that his wife "be given possession and control of the firearms collection" or, in the alternative, that "Robert Rosier be lawfully entitled to own the subject firearms collection and be awarded possession and control" and that "payment for the firearms be awarded to [petitioner] as the lawful non-possessory owner." D. Ct. Doc. 155, at 1, 2; see also D. Ct. Doc. 165, at 4 (Feb. 3, 2011) (similar request in petitioner's renewed motion). The government construed the motion as having been filed under Rule 41(g) of the Federal Rules of Criminal Procedure, D. Ct. Doc. 159, at 2 (Sept. 3, 2010), and petitioner has not questioned that construction,[2] which was shared by the court of appeals, see Pet. App. 2a, 4a. That rule provides as follows:

> **Motion to Return Property.** A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the dis-

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[2] See Pet. 6 (describing motion as one under Rule 41(g)); D. Ct. Doc. 170, at 5 (invoking Rule 41(g) in petitioner's objections to the magistrate judge's report and recommendation).

> trict where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

Fed. R. Crim. P 41(g).

Petitioner contended that transfer of the firearms to either his wife or Rosier was warranted because (1) the firearms did not relate to his crime; (2) the FBI did not have probable cause to seize them and did not follow its procedures for seizing property; (3) he had surrendered them only for safekeeping and to satisfy a bond condition; (4) when the FBI took the firearms, it did not tell him that he was effectively abandoning them; (5) he still held legal title to the firearms; and (6) he had neither abandoned them nor forfeited his interest in them. D. Ct. Doc. 165, at 3; D. Ct. Doc. 182, at 21-24, 31-33.

After a hearing, a magistrate judge recommended that petitioner's motion be denied. Pet. App. 7a-14a. The magistrate judge concluded that the case was controlled by the Eleventh Circuit's decision in *United States* v. *Howell*, 425 F.3d 971 (2005). Pet. App. 11a-14a.

The court in *Howell* held that the government was not required to return firearms it seized from a drug defendant's home because the defendant had become a convicted felon and returning them to him would violate 18 U.S.C. 922(g), which makes it a crime for a convicted felon to "possess in or affecting commerce[] any firearm or ammunition." 425 F.3d at 974-975. "[I]f an individual is a convicted felon," the court held,

"that individual will not be entitled to the return of seized firearms, either directly or indirectly. Requiring a court to return firearms to a convicted felon would not only be in violation of a federal law, but would be contrary to the public policy behind the law." *Id.* at 976. It further explained that "any firearm possession, actual or constructive, by a convicted felon is prohibited by law." *Id.* at 977 (quoting *United States* v. *Felici*, 208 F.3d 667, 670 (8th Cir. 2000), cert. denied, 531 U.S. 1201 (2001)). *Howell* also rejected the defendant's suggestion that the district court could place the firearms in a relative's possession or sell the firearms and give him the proceeds, explaining that such relief "is beyond the scope of Rule 41(g)." *Id.* at 976-977. The court in *Howell* separately noted that Rule 41(g) provides for only equitable relief and that the defendant was not entitled to such relief because, as someone who had engaged in drug dealing, he had "unclean hands." *Id.* at 974.

Here, the magistrate judge found that he was bound by *Howell* and that, even though petitioner's firearms had not been "seized," were not contraband, and had not been forfeited, petitioner had not "attempt[ed] to transfer ownership of the firearms until *after* he had been adjudicated guilty and was a convicted felon." Pet. App. 13a-14a.

3. Petitioner filed objections to the magistrate judge's report and recommendation. Pet. App. 5a. After conducting *de novo* review, the district court overruled those objections, adopted the magistrate judge's report and recommendation, and denied petitioner's motion. *Id.* at 5a-6a.

4. The court of appeals affirmed. Pet. App. 1a-4a. The court agreed that its prior decision in *Howell*

prevents courts from "violating 18 U.S.C. § 922(g) by delivering actual or constructive possession of firearms to a convicted felon" and "controls" the decision in this case. *Id.* at 3a-4a. The court noted that the method by which the government obtained the firearms was "immaterial" in *Howell*, and it stated that "[t]he fact that the government obtained [petitioner's] firearms because of a voluntary surrender pursuant to a judge's concern for his safety does not alleviate the concern that by granting [petitioner] actual or constructive possession of a firearm, a court would violate § 922(g)." Pet. App. 4a (citing *Howell*, 425 F.3d at 976). Because petitioner had invoked the courts' authority to "grant equitable relief" (Pet. C.A. Br. 16), the court of appeals added that petitioner, as a convicted drug offender, had "unclean hands to demand return of his firearms" even though he "did not use those firearms in furtherance of his offense." Pet. App. 4a (citing *Howell*, 425 F.3d at 974).

ARGUMENT

Petitioner contends (Pet. 8-32) that the decision below is incorrect and that the courts of appeals disagree about whether a defendant who is prohibited by 18 U.S.C. 922(g) from possessing a firearm is entitled under Rule 41(g) of the Federal Rules of Criminal Procedure to have non-contraband firearms that were held by the government during the criminal proceedings transferred to a third party or sold for the defendant's benefit. The decision below is correct, and the courts of appeals are not divided on the question presented by the facts of petitioner's case. Further review is accordingly unwarranted.

1. The court of appeals correctly affirmed the district court's denial of petitioner's motion that his fire-

arms be transferred to his wife or to a friend of his choosing.

a. As an initial matter, petitioner acknowledges (Pet. 6-7) that his motion was brought pursuant to Rule 41(g), which states that, when a court grants a motion under the rule, it "must *return the property* to the movant." Fed. R. Crim. P 41(g) (emphasis added). But neither Rule 41(g) nor any other provision identified by petitioner provides authority for the action petitioner sought: a transfer (either by gift or by sale) to a third party of his designation. See *United States* v. *Howell*, 425 F.3d 971, 977 (11th Cir. 2005) (explaining that a request that the court "either place the firearms in the possession of a relative in trust or sell the firearms and distribute the proceeds to [the defendant]" was "beyond the scope of Rule 41(g)"). Petitioner does not, and cannot, deny that the firearms could not actually be "return[ed]" to him without causing him to be in violation of Section 922(g)'s prohibition on felons' possession of firearms.

b. Petitioner instead draws (Pet. 13) a distinction between a convicted felon's "possessory interest in firearms, which Section 922(g) extinguishes," and his "larger ownership interest, which Section 922(g) leaves intact, recognizing that these interests represent different sticks in the property 'bundle.'" In petitioner's view, the government could "transfer" firearms "on behalf of the convicted owner," Pet. 16, and such a transfer "to a third party" could be made without "giv[ing] the owner" (*i.e.*, petitioner) any "'right to control' or 'right to exclude,' the two central indicia of possession," Pet. 18.

Petitioner's proposed transaction, however, cannot be reconciled with his own theory for two reasons.

First, his transaction would vest the supposedly extinguished possessory interest in a third party. See Pet. 19 (noting that "the new owner gains these possessory rights"). Second, petitioner's proposed transfer would vest that possessory right in a person of petitioner's own choosing (either his wife or his friend, Robert Rosier). See Pet. App. 8a; D. Ct. Doc. 155, at 1, 2; D. Ct. Doc. 165, at 4; D. Ct. Doc. 182, at 24-25.[3] That belies petitioner's suggestion (Pet. 19) that the transaction would "give[] him no right to control or right to exclude," because it would still permit him to determine who would (and who would not) next have access to the firearms, and it would not even rule out the possibility that his wife or friend would subsequently allow him further control over them. Under the circumstances, both of petitioner's proffered options created a significant risk that petitioner would retain custody or control over the firearms, in violation of Section 922(g). See *United States* v. *Zaleski*, 686 F.3d 90, 93 (2d Cir.) ("Whether a particular proposed arrangement would constitute prohibited constructive possession will be an issue of fact to be determined by the District Court."), cert. denied, 133 S. Ct. 554 (2012); *United States* v. *Miller*, 588 F.3d 418, 419 (7th Cir. 2009) ("if the United States were to surrender the firearms to someone willing to accept [the

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[3] At the hearing, petitioner's phrasing was slightly broader than in his written motions, but it still required the transferee to be a person of his choosing. He asked first that his wife "be given possession of, title, and control of the firearms collection for the benefit of my adult children and heirs." D. Ct. Doc. 182, at 24. "In the alternative," he asked that the court "issue Mr. Robert Rosier ownership, title, and possession, or any other *person of my choosing* who is lawfully entitled to own subject firearm collection." *Ibid.* (emphasis added).

defendant's] instructions about their disposition, then [the defendant] would retain constructive possession"). A court exercising equitable discretion is not required to run that risk. See *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 718 (1996) (noting the "historic discretion exercised by federal courts 'sitting in equity'"); *Howell*, 425 F.3d at 974 ("A motion to return seized property under Fed. R. Crim. P 41(g)[] is a motion in equity, in which courts will determine all the equitable considerations in order to make a fair and just decision.").

Thus, even assuming that a Rule 41(g) motion may be used to transfer property to a third party—rather than simply return it to the movant—such a motion clearly may be denied where, as here, a transfer would result in constructive possession by a convicted felon.

c. The court of appeals' decision does not present the constitutional concerns that petitioner identifies (Pet. 23-26) when the government deprives someone of ownership interests. Nowhere does the decision below suggest that a defendant loses his ownership rights in non-contraband and non-forfeited firearms. Nor does it suggest that the government may affirmatively employ the firearms for its own purposes without providing just compensation. Compare Pet. 25. Instead, the court of appeals held only that, where a transfer would result in constructive possession of a firearm by a convicted felon, a Rule 41(g) motion is properly denied. See Pet. App. 4a ("by granting [petitioner] actual or constructive possession of a firearm, a court would violate § 922(g)").

d. Nor is there merit to petitioner's contention (Pet. 25) that the decision below leaves "a firearm owner charged with a non-violent felony" with only

"three bad options." He suggests (*ibid.*) that a defendant (like himself) who voluntarily surrenders firearms when charged will be unable to receive any "compensation if convicted of the felony." But petitioner's supposed dilemma arose only because he gave his personal firearms to the government (rather than someone else) in June 2006, and because he then "did not attempt to transfer ownership of the firearms to another person until after he had been adjudicated guilty and was a convicted felon," which occurred when his agreement to plead guilty—which acknowledged his impending inability to possess firearms—was accepted in December 2007. Pet. App. 4a, 8a, 9a, 14a (emphasis omitted).[4]

2. Petitioner contends (Pet. 9-14) that this Court's review is necessary to resolve a disagreement in the courts of appeals about whether a court must grant a convicted felon's Rule 41(g) motion requesting that the federal government transfer the felon's firearms to a third party or sell them. But the courts of appeals have not disagreed about the disposition of a case like this, in which a defendant requests only that the firearms be released to his relative or to a friend of his choosing.

a. Petitioner identifies (Pet. 9-11) the Eighth and Eleventh Circuits as having published opinions on one side of the split. In *Howell*, *supra*, the Eleventh Cir-

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[4] Because the government acquired the firearms when petitioner chose to give them to FBI agents rather than someone else, the government cannot be charged with seeking forfeiture "without satisfying any of the" associated procedural requirements. Pet. 23. The government did not affirmatively seek possession of the firearms for forfeiture or any other purpose; petitioner voluntarily placed them in the government's custody.

cuit held that "a convicted felon * * * will not be entitled to the return of seized firearms, either directly or indirectly. Requiring a court to return firearms to a convicted felon would not only be in violation of a federal law, but would be contrary to the public policy behind the law." 425 F.3d at 976. *Howell* did not, as petitioner asserts (Pet. 4, 9-10), hold that a defendant loses all of his "ownership interest" in non-contraband firearms. It held only that any action by the court that would result in the direct or indirect return of firearms to a convicted felon would violate Section 922(g) and that a request that the court transfer property to a third party or sell it is "beyond the scope of Rule 41(g)." 425 F.3d at 976-977.

The *Howell* court cited the Eighth Circuit's decision in *United States* v. *Felici*, 208 F.3d 667 (2000), cert. denied, 531 U.S. 1201 (2001), which held that a defendant who has been convicted of a felony is not entitled under Rule 41(g) to have firearms returned to him or transferred to a third party who would hold the firearms in trust for the defendant because the holding of firearms in trust for the defendant would constitute constructive possession by the defendant and "[a]ny firearm possession, actual or constructive, by a convicted felon is prohibited by law." *Id.* at 670.[5]

In unpublished decisions, the Third and Sixth Circuits have agreed with *Howell* and *Felici*. *United States* v. *Roberts*, 322 Fed. Appx. 175, 176-177 (3d Cir. 2009) (affirming order denying defendant's motion for

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[5] The Eighth Circuit had previously held that it would "make a mockery" of Section 922(g) to allow a defendant prohibited from possessing firearms to receive the proceeds of the sale of those firearms. *United States* v. *Bagley*, 899 F.2d 707, 708, cert. denied, 498 U.S. 938 (1990).

transfer of firearms to his mother to keep or sell); *United States* v. *Headley*, 50 Fed. Appx. 266, 267 (6th Cir. 2002) (holding that firearms could not be returned to defendant or transferred to a third party to be held in defendant's trust).

Thus, petitioner is correct that the decision below is consistent with holdings in published or unpublished opinions in four circuits (even if those decisions do not go as far as petitioner suggests in some regards).

b. Petitioner nevertheless errs in suggesting (Pet. 11-14) that the Second, Fifth, and Seventh Circuits have adopted a view that is directly contrary to the decision below. While those courts have disagreed with aspects of the reasoning of the Eighth and Eleventh Circuits, none of them has held that courts must approve the kind of request that was made by petitioner.

In the Second Circuit's decision in *Zaleski*, *supra*, the defendant had asked the district court to permit the transfer of his firearms to a federally licensed gun dealer who would sell them, comply with any procedures required by the court, and remit the proceeds to the defendant. 686 F.3d at 92. In the alternative, the defendant requested a third-party appraisal of the firearms for use in a subsequent civil suit against the government for damages. *Ibid.* The Second Circuit held only that, in light of those requests, the district court erred in concluding that the defendant was categorically ineligible for any relief. The court stated that "*under limited circumstances* a convicted felon may arrange to benefit from the sale of otherwise lawful, unforfeited firearms by a third party without actually or constructively possessing them." *Id.* at 93

(emphasis added). It further concluded that the defendant's "proposed arrangement" could "be approved without running afoul of Section 922(g)(1) if" the following three conditions were satisfied: (1) "the evidence shows that transferring the weapons to [the firearms dealer] would *in fact* strip Zaleski of any power to exercise dominion and control over them," (2) the dealer "is a suitable custodian and not subject to Zaleski's control," and (3) "the arrangement is otherwise equitable." *Ibid.* Thus, the decision in *Zaleski* strongly implied that where, as here, such factors are not present, a court should not grant (or at least is not compelled to grant) a convicted felon's motion to return firearms; indeed, the Second Circuit observed that "[w]hether a particular proposed arrangement would constitute prohibited constructive possession will be an issue of fact to be determined by the District Court." *Id.* at 93.

Likewise, in the Seventh Circuit's decision in *Miller*, *supra*, the appeal was from a district court order requiring the government to destroy the defendant's firearms. 588 F.3d at 419. The court held only that the district court erred because destroying the firearms and having the government pay the defendant just compensation as calculated through an action under the Tucker Act, 28 U.S.C. 1346(a)(2), 1491, was not the sole option available to the court. 588 F.3d at 419-420. The court noted (without citations or further explanation) that other permissible resolutions of the defendant's Rule 41(g) motion would have included ordering the "[t]ransfer of the firearms in trust to a reliable trustee (such as a bank) that promises to put them in a safe deposit vault and not return them to [the defendant], or honor any of his instructions about

them, unless he regains his ability to possess them lawfully"; "[s]torage of the firearms by the United States while [the defendant's] firearms disability continues"; or a "[g]ift of the firearms to one of [the defendant's] friends or relatives," which could be "conditioned on the recipient's written acknowledgment that returning the guns to [the defendant] or honoring his instructions would aid and abet [the defendant's] unlawful possession." *Id.* at 420. That last option differs critically from what petitioner proposed in this case, because the Seventh Circuit contemplated sufficient assurances that the defendant would not retain effective custody or control over the weapons. See *id.* at 419 (recognizing that "if the United States were to surrender the firearms to someone willing to accept [the defendant's] instructions about their disposition, then [the defendant] would retain constructive possession"). No such assurances existed here.

The Fifth Circuit's decision in *Cooper* v. *City of Greenwood*, 904 F.2d 302 (1990), did not involve Rule 41(g) at all. In that civil case, the court of appeals reversed a summary judgment rejecting the plaintiff's action under 42 U.S.C. 1983, in which he claimed that the local police had deprived him, without due process, of his property interest in non-forfeited firearms, when they sold them at auction for $30,000 and provided him with none of the proceeds. 904 F.2d at 304. The court held that the defendant, although precluded from possessing the firearms once he was convicted, had retained a property interest protected by the Due Process Clause and that the firearms in question could have been sold on his account or he could have been given a "partial remission of sale proceeds." *Id.* at

305-306. Neither of those options, however, was presented by petitioner, who instead sought to have his firearms transferred to a person of his own choosing, and did so pursuant to Rule 41(g).

Petitioner also cites (Pet. 12, 14) the Montana Supreme Court's decision in *State* v. *Fadness*, 268 P.3d 17 (2012). That case applied a state-law provision that, unlike Rule 41(g), allowed for the sale of "non-contraband property at public sale or auction." *Id.* at 29 (quoting Mont. Code Ann. 46-5-308(1)(e)). The state supreme court held that the trial court did not abuse its discretion in allowing the State to sell Fadness's firearms "at public sale or auction, or to a licensed firearms dealer, with the proceeds to go to Fadness's father as agent for Fadness." *Id.* at 30. But the supreme court also affirmed the trial court's refusal to release the firearms, as Fadness requested, directly to Fadness's parents "for them to sell on his behalf." *Ibid.* Indeed, the supreme court found that the trial court could have denied that request even if it "had concluded that Fadness would *not* have constructive possession of his weapons upon their release to his parents." *Ibid.* That result is consistent with, rather than in conflict with, the decision below, in which petitioner asked that his firearms be transferred to one of two people he identified.

c. There is therefore no conflict in the courts of appeals on the question presented by the facts of this case: *i.e.*, whether a district court is required under Rule 41(g) to order the return of non-contraband firearms to a spouse or friend identified by a convicted felon. Although *Zaleski* and *Miller* posited that a court has other alternatives available to it (such as releasing the firearms to a licensed firearms dealer or

disinterested trustee, or retaining the firearms until the defendant's firearms disability expires), those decisions do not conflict with the unpublished decision below, because petitioner did not present any of those alternatives, and because the court of appeals did not hold that a defendant necessarily loses his ownership interest in non-contraband and non-forfeited firearms. This case would accordingly be a poor vehicle for resolving any dispute about the viability of such alternatives.

d. Finally, petitioner also contends (Pet. 14-16) that this Court should resolve whether the "unclean hands" doctrine provides an independent basis to deny a Rule 41(g) motion for the return of firearms to a convicted drug dealer. Yet, it is unclear whether, or to what extent, the Eleventh Circuit would apply the "unclean hands" doctrine as a fully independent bar to relief on other facts. See Pet. App. 4a (stating that the unclean hands doctrine, as construed in *Howell*, bars a felon from "demand[ing] *return* of his firearms") (emphasis added). And, as petitioner acknowledges (Pet. 14), "no court of appeals besides the Eleventh Circuit has held that a person's status as a felon gives him unclean hands to seek return of non-contraband property through Rule 41(g)." Petitioner reads (Pet. 15-16) the Eighth Circuit's decision in *Felici* as rejecting the Eleventh Circuit's unclean-hands analysis. In fact, however, the portion of the opinion on which he relies—which required the district court to receive evidence about whether certain items were contraband—was about "items that were not firearms," because the court had already held that "the district court could properly deny Felici's motion for the return of his firearms without receiving any

additional evidence." 208 F.3d at 670, 671. Petitioner would therefore be as ineligible for Rule 41(g) relief in the Eighth Circuit as in the Eleventh. Further review of the court of appeals' two-sentence discussion of the applicability of the "unclean hands" doctrine is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY BRIEF

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In the Supreme Court of the United States

TONY HENDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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TABLE OF CONTENTS

Page

Table Of Authorities II

A. This Case Implicates a Recognized, Deep Circuit Split 3

B. The Government's *Own* Characterization of Mr. Henderson's *Pro Se* Pleading as a "Rule 41(g) Motion" Cannot Bar Transfer to Third Parties 6

C. The Government's Transfer or Sale of the Firearms to a Proper Third Party Would Not Impute Constructive Possession to Mr. Henderson 9

Conclusion 11

TABLE OF AUTHORITIES

Cases: **Page(s)**

Castro v. *United States*, 540 U.S. 375 (2003) 7

Cooper v. *City of Greenwood*, 904 F.2d 302 (5th Cir. 1990) 6

De Almedia v. *United States*, 459 F.3d 377 (2d Cir. 2006) 8

Heebe v. *United States*, Civ. No. 10–3452, 2010 WL 5376119 (E.D. La. Dec. 20, 2010) 8

Matthews v. *United States*, 917 F. Supp. 1090 (E.D. Va. 1996) 8-9

Santiago v. *Meinsen*, 89 F. Supp. 2d 435 (S.D.N.Y. 2000) 7

Smith v. *Katzenbach*, 351 F.2d 810 (D.C. Cir. 1965) 8

State v. *Fadness*, 268 P.3d 17 (Mont. 2012) 10

Sylla v. *Ruh*, No. CV 10–3325(JFB)(GRB), 2012 WL 4370187 (E.D.N.Y. Aug. 30, 2012) 7

United States v. *Castro*, 883 F.2d 1018 (11th Cir. 1988) 8

United States v. *Duncan*, 918 F.2d 647 (6th Cir. 1990) 8

United States v. *Felici*, 208 F.3d 667 (8th Cir. 2000) 1

United States v. *Giraldo*, 45 F.3d 509 (1st Cir. 1995) 8

United States v. *Harvey*, 78 F. App'x 13 (9th Cir. 2003) 1

United States v. *Howell*, 425 F.3d 971 (11th Cir. 2005) 4

Cases—Continued: **Page(s)**

United States v. *Martinez*, 241 F.3d 1329 (11th Cir. 2001) 8

United States v. *Miller*, 588 F.3d 418 (7th Cir. 2009) 4, 10

United States v. *Miller*, No. 3:04–CR–00138(2)RM, 2009 WL 1228560 (N.D. Ind. Apr. 28, 2009) 4

United States v. *Rapp*, 539 F.2d 1156 (8th Cir. 1976) 8

United States v. *Rodriguez*, No. EP–08–CR–1865–PRM, 2011 WL 5854369 (W.D. Tex. Feb. 18, 2011) 6

United States v. *Search of Law Office*, 341 F.3d 404 (5th Cir. 2003) 8

United States v. *Woodall*, 12 F.3d 791 (8th Cir. 1993) 8

United States v. *Zaleski*, 686 F.3d 90 (2d Cir.), cert. denied, 133 S. Ct. 554 (2012) 5, 6, 10

Watts v. *United States*, No. 3–01–CV–2100–R, 2002 WL 999320 (N.D. Tex. May 10, 2002) 6

Rule:

Fed. R. Crim. P. 41(g) 10

Miscellaneous:

Frederick C. Benson, Comment, *The Firearm-Disability Dilemma: Property Insights into Felon Gun Rights*, 80 U. Chi. L. Rev. 1231 (2013) 1, 2

Lydia Saad, *Self-Reported Gun Ownership in U.S. Is Highest Since 1993*, GALLUP Politics (Oct. 26, 2011), http://goo.gl/28bQy5 1

U.S. Dep't of Justice, Bureau of Justice Statistics, *Federal Justice Statistics 2006—Statistical Tables*, Table 1.1 1

U.S. Dep't of Justice, Bureau of Justice Statistics, *Felony Sentences in State Courts, 2006—Statistical Tables*, Table 4.2 1

REPLY BRIEF FOR THE PETITIONER

The brief in opposition is most remarkable for what it does not say. It never denies that this issue recurs frequently. It scarcely could. The question whether a person convicted of a felony may transfer firearms without violating § 922(g)'s prohibition on "possessing" firearms has "generated a significant amount of litigation." Frederick C. Benson, Comment, *The Firearm-Disability Dilemma: Property Insights into Felon Gun Rights*, 80 U. Chi. L. Rev. 1231, 1245 (2013) In fact, *eight* federal courts of appeals have squarely ruled on it.[1]

Nor does the government deny that the question presented is important. Again, it scarcely could. More than *one million people* are convicted of felonies during an average year[2] and *one American in three* owns a firearm.[3] Nor does the government dispute that the Eighth and Eleventh Circuits' approach deprives convicted owners of the complete economic value of their firearms—common household assets often worth thousands of dollars that could apply to support dependents. See Pet. 30 (noting value of firearms in cases at issue in circuit split).

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[1] See Pet. 9-14 (outlining split); see also *United States* v. *Harvey*, 78 F. App'x 13, 14-15 (9th Cir. 2003) (rejecting argument that district court must order sale of firearms for convicted felon's benefit, citing *United States* v. *Felici*, 208 F.3d 667, 670 (8th Cir. 2000)).

[2] See U.S. Dep't of Justice, Bureau of Justice Statistics, *Felony Sentences in State Courts, 2006—Statistical Tables*, Table 1.1; U.S. Dep't of Justice, Bureau of Justice Statistics, *Federal Justice Statistics 2006—Statistical Tables*, Table 4.2.

[3] Lydia Saad, *Self-Reported Gun Ownership in the U.S. is Highest Since 1993*, GALLUP Politics (Oct. 26, 2011), http://goo.gl/28bQy5.

Nor does the government even deny that the circuits are "divided into two camps," with "some courts" permitting persons convicted of felonies to dispose of firearms "and others refusing to do so." Benson, 80 U. Chi. L. Rev. at 1245. In fact, the government itself has previously *acknowledged* that "[t]he Circuits and lower courts are divided * * * on the question of transfer to third parties." Gov't Br. at 76, *United States* v. *Zaleski*, 686 F.3d 90 (2d Cir.) (Nos. 11-1888, 11-660), cert. denied, 133 S. Ct. 554 (2012); accord Gov't C.A. Br. 16 (noting that cases on other side of split "expressly reject [*United States* v.] *Howell*"). As noted in the petition (12-13 n.2), the government itself has taken inconsistent positions on the merits of this issue, having agreed to facilitate such firearms transfers in some other cases.

Finally, the government does not deny that this Court can fully settle the conflict only by taking a case from a court, like the Eleventh Circuit, that also bars felons from recovery by virtue of their "unclean hands." The government does not even pretend to defend that alternative holding. It simply argues—incorrectly, see Pet. 28—that the Eighth Circuit *might* also adopt it, Br. in Opp. 17-18 (BIO).

Ultimately, the government can muster just three flimsy arguments against granting the writ. First, it argues that the courts are not divided "*on * * * the facts of petitioner's case*"—at least as the government has attempted to narrowly and peculiarly redefine his claim. BIO 7 (emphasis added). Second, it claims that "neither Rule 41(g) [of the Federal Rules of Criminal Procedure] nor any other provision *identified by petitioner* provides authority" for the transfer of the firearms. *Id.* at 8 (emphasis added). Third, it contends that transfer to a third party necessarily would attach constructive

possession to Mr. Henderson. *Id.* at 10. None of these arguments withstands even brief scrutiny, let alone cautions against this Court's review.

A. This Case Implicates a Recognized, Deep Circuit Split

The government concedes "that the Second, Fifth, and Seventh Circuits * * * have disagreed with aspects of the reasoning of the Eighth and Eleventh Circuits." BIO 13. The government, moreover, cannot dispute that *all* those cases would have come out differently had those courts applied the rule that prevails in the Eight and Eleventh Circuits. Instead, the government attempts to recharacterize petitioner's claim not as a right to receive the proceeds from a sale or arrange a transfer to a third party but peculiarly as a right "that the firearms be released to his relative or to a friend of his choosing," *id.* at 11, and then argues that none of the three circuits on the other side of the split has "held that courts must approve th[is particular] kind of request," *id.* at 13.

The government's argument is wrong. It mischaracterizes both what Mr. Henderson requested and what the Eleventh Circuit held. As to the former, the Eleventh Circuit understood Mr. Henderson to have asked "to transfer ownership to [a] buyer," Pet. App. 2a, not to "a friend," BIO 11, and record evidence indicates that Mr. Rosier, the final "buyer" Mr. Henderson identified, was from another city, an "acquaintance" of a highway patrol officer Henderson knew. Evidentiary H'rg 25, May 16, 2011, ECF No. 182.

None of the decisions below, moreover, relied on Rosier's status as a "friend." All held against petitioner on the ground that transferring the guns to *anyone* would violate §922(g). See Pet. App. 3a-4a (holding that

"*Howell* controls," the case in which the court refused to have government "sell the firearms and distribute the proceeds to [defendant]," *United States* v. *Howell*, 425 F.3d 971, 977 (11th Cir. 2005)); *id.* at 13a-14a (magistrate judge holding that he was "bound by *Howell*[, which bars] transfer [of] ownership of the firearms to *another person*") (emphasis added); *id.* at 5a (district court adopting same).

As to the latter, the Eleventh Circuit expressly acknowledged the circuit split, Pet. App. 3a, and held for the government not because it believed the opposing view would have yielded the same decision in Mr. Henderson's case, but rather because "we find that our decision in *Howell* controls," *id.* at 4a.

It is simply wrong to claim that the opposing circuits would not have decided Mr. Henderson's case differently. See BIO 11. As Judge Easterbrook wrote for the Seventh Circuit in *United States* v. *Miller*, 588 F.3d 418 (2009), § 922(g) does not prohibit the government's selling firearms and giving the proceeds to the owner—or even transferring "the firearms to one of [the owner's] *friends or relatives*," provided the recipient acknowledges that he or she cannot return the firearms to the original owner or "honor[] his instructions" about them. *Id.* at 419-420 (emphasis added). It is irrelevant, moreover, that "[n]o such assurances existed here." BIO 15. In *Miller* itself, the district court had expressly adopted *Howell*'s approach and held that § 922(g) categorically barred a gun owner from receiving "the proceeds from a[ny] sale of the firearms." *United States* v. *Miller*, No. 3:04–CR–00138(2)RM, 2009 WL 1228560, at *4 (N.D. Ind. Apr. 28, 2009). Neither the owner nor the government argued (1) that the firearms could be given to the owner's "friends or relatives" with proper

precautions, (2) that they could be held in a trust, or (3) that the government could hold them for the duration of the owner's § 922(g) disability. See Def.'s C.A. Br., *Miller*, 588 F.3d 418 (No. 09-2265); Gov't C.A. Br., *Miller*, 588 F.3d 418. But the Seventh Circuit itself identified those alternative dispositions *sua sponte* and directed the district court to consider their appropriateness on remand. The *pro se* owner's failure to suggest those alternatives here thus does not make this case a "poor vehicle for resolving [the] dispute." BIO 17.

The government's imaginative reading of *United States* v. *Zaleski*, 686 F.3d 90 (2d Cir. 2012), suffers from the same flaws. The Second Circuit stated there that it was

> persuaded by the Seventh Circuit's reasoning in *Miller*. Although Section 922(g)(1) prohibits constructive possession, as well as actual physical possession, of firearms and ammunition, under limited circumstances a convicted felon may arrange to benefit from the sale of otherwise lawful, unforfeited firearms by a third person without actually or constructively possessing them.

Id. at 93 (citation and footnote omitted). In context, the words the government extracts and highlights—"*under limited circumstances*," BIO 13—at least include the broad range of options *Miller* required the district court to consider, and which Mr. Henderson would be entitled to pursue. Indeed, the government identifies no reason why Mr. Henderson (and others like him in the Eighth and Eleventh Circuits) should not be given the relief the Second Circuit approved, *i.e.*, an opportunity to show that: (1) the sale to a third party would "strip [him] of any power to exercise dominion and control over [the firearms];" (2) that the buyer is "not subject to [his]

control;" and (3) that "the arrangement is otherwise equitable." *Zaleski*, 686 F.3d at 93.

It is true (BIO 15-16) that the Fifth Circuit's decision in *Cooper* v. *City of Greenwood*, 904 F.2d 302 (1990), was a § 1983 damages action, and not a Rule 41(g) proceeding seeking a sale for the owner's benefit. But that is irrelevant. *Cooper*'s central holding—that § 922(g) strips owners of their possessory interest in firearms but leaves their other ownership interests intact, see Pet. 12-13—stands in direct conflict with the Eighth and Eleventh Circuits' contrary rule. The government offers no reason to believe that the Fifth Circuit would not hold the same way in a case involving a Rule 41(g) motion. Indeed, district courts within the circuit have consistently done so, on the authority of *Cooper*. See, *e.g.*, *United States* v. *Rodriguez*, No. EP–08–CR–1865–PRM, 2011 WL 5854369, at *9-10 (W.D. Tex. Feb. 18, 2011); *Watts* v. *United States*, No. 3–01–CV–2100–R, 2002 WL 999320, at *2-3 (N.D. Tex. May 10, 2002).

B. The Government's *Own* Characterization of Petitioner's *Pro Se* Pleading as a "Rule 41(g) Motion" Cannot Bar Transfer to Third Parties

On the merits, the government argues that Federal Rule of Criminal Procedure 41(g) does not "provid[e] authority for the action petitioner sought" because the Rule by its terms permits only the *return* of property, not transfer or sale to a third party. BIO 8. This argument, which the government advances for the first time in this Court, is odd indeed. Mr. Henderson styled his original motion as a "Motion to Return/Disposition of Property" and *nowhere* mentioned Rule 41(g). See Mot. to Return/Disposition of Prop. His authority for the transfer was the court's "equitable powers." *Id.* at 1 (citing case law). As the government admits, *it* restyled

his general equitable motion as "a motion pursuant to Fed. R. Crim. P. 41(g)." Gov't Resp. to Def.'s Mot. to Return/Disposition of Prop. 2; see BIO 4 (noting "the government construed the motion as having been filed under Rule 41(g)"). The government can hardly hold Mr. Henderson to (supposed) limitations in the terms of a rule that he did not invoke and that the government pressed on him.

But even if it could, that would make no difference. As the government well knows, "documents filed by pro se litigants are to be liberally construed." U.S. Br. as Amicus Curiae Supp'g Resp'ts, *Fed. Express Corp.* v. *Holowecki*, at 20 n.11, 552 U.S. 389 (2008) (No. 06-1322) (collecting authorities). "Federal courts sometimes will ignore the legal label that a *pro se* litigant attaches to a motion and recharacterize the motion in order to place it within a different legal category," *Castro* v. *United States*, 540 U.S. 375, 381 (2003), and generally will not deny relief "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," *Santiago* v. *Meinsen*, 89 F. Supp. 2d 435, 438 (S.D.N.Y. 2000). Indeed, this principle has "particular force"

> in the context of actions relating to seized property. Such actions, which inhabit a nebulous and mutable intersection of criminal prosecution and civil claims, are fraught with complexities, including constitutional doctrines, jurisdictional issues, and the arcane procedures of administrative, civil and criminal forfeiture. As such, when considering a *pro se* plaintiff's effort to recover seized property, it would appear that additional latitude should be afforded.

Sylla v. *Ruh*, No. CV 10–3325(JFB)(GRB), 2012 WL 4370187, at *2 (E.D.N.Y. Aug. 30, 2012).

The courts of appeals have therefore *uniformly* held that "a pleading by a *pro se* plaintiff which is styled as a Rule 41[(g)] motion should be liberally construed as seeking to invoke the proper remedy."[4] *United States* v. *Giraldo*, 45 F.3d 509, 511 (1st Cir. 1995) (per curiam); accord, *e.g.*, *United States* v. *Martinez*, 241 F.3d 1329, 1330 (11th Cir. 2001) (noting every court of appeals to address the issue "ha[s] treated such motions as civil proceedings for equitable relief"); *De Almedia* v. *United States*, 459 F.3d 377, 379-380 (2d Cir. 2006); *United States* v. *Woodall*, 12 F.3d 791, 794 n.1 (8th Cir. 1993), *abrogated on other grounds by Dusenbery* v. *United States*, 534 U.S. 161 (2002); *United States* v. *Duncan*, 918 F.2d 647, 654 (6th Cir. 1990). It is therefore doubly irrelevant that "Rule 41(g) [does not] provide[express] authority" for transfer or sale to a third party. BIO 8.

But even if the government could hold a *pro se* litigant to the limitations of a rule he did not invoke, that would *still* make no difference. It is well recognized that Rule 41(g) is "a crystallization of a principle of equity jurisdiction[and that t]hat equity jurisdiction exists as to situations not specifically covered by the Rule," *United States* v. *Castro*, 883 F.2d 1018, 1020 (11th Cir. 1989) (collecting authorities), and "[a]lternatively [that] the same result can be reached by a broad reading of the Rule," *United States* v. *Rapp*, 539 F.2d 1156, 1160 (8th Cir. 1976) (quoting *Smith* v. *Katzenbach*, 351 F.2d 810, 814 (D.C. Cir. 1965)); accord *Heebe* v. *United States*, Civ. No. 10–3452, 2010 WL 5376119, at *1 (E.D. La. Dec. 20, 2010); *Matthews* v. *United States*, 917 F. Supp. 1090, 1101

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[4] "In December 2002 Rule 41(e) was relettered as Rule 41(g)." *United States* v. *Search of Law Office*, 341 F.3d 404, 408 n.3 (5th Cir. 2003).

(E.D. Va. 1996). Thus, *no* circuit, even those foreclosing government sales and third-party transfers, has considered the text of Rule 41 an obstacle. The sole obstacle is § 922(g)—except in the Eleventh Circuit where the doctrine of "unclean hands" also bars such transactions, see Pet. 14-16.

Although the government faults Mr. Henderson for "voluntar[il]y surrender[ing]" the firearms, BIO 7, it does not dispute that he acquiesced to the court's *request* to surrender them "for his safety," *ibid.* Its claim that "[t]he government did not affirmatively seek possession of the firearms," *id.* at 11 n.4, is hard to square with the prosecutor's statement that "the *FBI came to his house and took possession of* the firearms," Evidentiary H'rg 29, May 16, 2011, ECF No. 182 (emphasis added).

C. The Government's Transfer or Sale of the Firearms to a Third Party Would Not Impute Constructive Possession to Mr. Henderson

The government's sole remaining argument—that transfer to a third party would constitute constructive possession by Mr. Henderson—is simply wrong. First, the government suggests that Mr. Henderson's position is self-contradictory because "his transaction would vest * * * supposedly extinguished possessory interest[s] in a third party." BIO 9. But petitioner has never claimed that *all* possessory interests in the guns were extinguished—only that *his* were. The government now holds all possessory interests in the firearms Mr. Henderson owns. It is no contradiction to argue that the government could transfer the possessory interests *it* currently holds to a third party.

Second, the government argues that constructive possession bars any transfer because Mr. Henderson is

proposing transfer to a "person of [his] own choosing." BIO 9. Petitioner does not deny that a court could legitimately bar transfer to some people that the owner of firearms might choose. As in *State* v. *Fadness*, 268 P.3d 17 (Mont. 2012), the court could bar transfer to an owner's elderly parents, when it has reason to question whether the firearms would then be beyond the owner's influence or control. But as several circuits have recognized, transfer to a third party over whom the owner has no influence (or, under appropriate conditions, even transfer to one over whom the seller otherwise might have influence) does not constitute constructive possession under § 922(g). See *Zaleski*, 686 F.3d at 93; *Miller*, 588 F.3d at 419-420. The government identifies no evidence that Mr. Henderson exercised such influence over either of the proposed buyers here; even if it *had*, Mr. Henderson should be allowed to show that appropriate safeguards could effectively insulate the buyer from disqualifying influence. See *id.* at 420; cf. Fed. R. Crim. P. 41(g) (noting courts "may impose reasonable conditions to protect access to the property and its use in later proceedings").

Perhaps the government means to argue that determining who will possess property is itself constructive possession. But, as the petition explains (18-20), that cannot be right. A bailor who sells to a third party property held by a bailee does not enjoy possession; the bailee enjoys it until the bailment ends, when the property can be claimed by the new owner. Similarly, a landlord who sells property to a third party subject to a tenancy does not gain any possessory interest. The tenant enjoys it for the remainder of the term and then the new owner does.

In any event, Mr. Henderson has never opposed a government sale of his firearms at market value so long as it gives him the proceeds. The government does not even *attempt* to defend the conclusion that that transaction would impute constructive possession to him in violation of § 922(g). BIO 12 n.5. Section 922(g) plainly addresses the potential danger of felons *having access to* firearms. There is no indication Congress sought to prohibit them from using the proceeds from firearm sales to support their dependents.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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JOINT APPENDIX

Supreme Court, U.S.
FILED
DEC 8 2014
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No. 13-1487

In the Supreme Court of the United States

TONY HENDERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

JOINT APPENDIX

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TABLE OF CONTENTS

Page

Opinions, Judgments, and Orders Contained in the Petition Appendix 1

Relevant docket entries, *Henderson* v. *United States*, No. 12-14628 (11th Cir.) 2

Relevant docket entries, *Henderson* v. *United States*, No. 06-cr-00211-TJC-TEM-1 (M.D. Fla.) 4

Relevant docket entries, *Henderson* v. *United States*, No. 3:06-mj-01145-MCR-1 (Magistrate Judge's Docket) (M.D. Fla.) 12

Transcript of Bond Hearing Before Magistrate Judge on June 7, 2006, Magistrate Judge's Dkt. No. 16..... 14

Order Setting Conditions of Release, D.C. Dkt. No. 8..... 32

Petitioner's Motion to Return/Disposition of Property, D.C. Dkt. No. 155..... 38

Government's Response to Petitioner's Motion to Return/Disposition of Property, D.C. Dkt. No. 159 57

Government's Notice to the Court of Pending Administrative Action, D.C. Dkt. Nos. 164 & 164-1 62

Petitoiner's Renewed Motion to Return/Disposition of Property, D.C. Dkt. No. 165 66

Government's Notice to the Court Concerning Exhaustion of Administrative Remedies, D.C. Dkt. No. 166..... 74

Clerk's Minutes Containing Exhibits for May 16, 2011 Hearing, D.C. Dkt. No. 168..... 76

Petitioner's Objections to Magistrate Judge's Report and Recommendation, D.C. Dkt. No. 170 126

Transcript of May 16, 2011 Hearing, D.C. Dkt. No. 182..... 134

Petitioner's Brief in the Court of Appeals, "Appeal of Denial of Motion to Return Property Under Rule 41(g)," C.A. Dkt. Date June 27, 2013..... 177

OPINION, ORDER, AND REPORT AND RECOMMENDATION CONTAINED IN THE PETITION APPENDIX

The following opinion, order, and report and recommendation have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Writ of Certiorari:

Opinion of the U.S. Court of Appeals for the Eleventh Circuit, dated January 28, 2014 ..... 1a

Order of the U.S. District Court for the Middle District of Florida, dated August 8, 2012 ..... 5a

Report and Recommendation of the Magistrate Judge, dated May 27, 2011 ..... 7a

General Docket
United States Court Of Appeals
for the Eleventh Circuit

No. 12-14628

United States of America,
Plaintiff-Appellee,

v.

Tony Henderson, a.k.a. Hollywood,
Defendant-Appellant.

Appeal from Middle District of Florida
Jacksonville Division

Date Filed	Docket Text
09/07/2012	CRIMINAL APPEAL DOCKETED. Notice of appeal filed by Appellant Tony Henderson on 09/05/2012. * * *
* * *	
06/27/2013	Appellant's brief filed by Tony Henderson. Service date: 06/25/2013 [12-14628]. * * *
09/18/2013	Appellee's Brief filed by Appellee USA. Service date: 09/18/2013 * * *

01/28/2014	Judgment entered as to Appellant Tony Henderson. * * *
01/28/2014	Opinion issued by court as to Appellant Tony Henderson. Decision: Affirmed. Opinion type: Non-Published. Opinion method: Per Curiam.
02/27/2014	Mandate issued as to Appellant Tony Henderson.
06/12/2014	Notice of Writ of Certiorari filed as to Appellant Tony Henderson. SC# 13-1487.
10/21/2014	Writ of Certiorari filed as to Appellant Tony Henderson is GRANTED. SC# 13-1487.

U.S. District Court
Middle District OF Florida
(Jacksonville)

CRIMINAL DOCKET FOR
CASE #: 3:06-cr-00211-TJC-TEM-1

USA, Plaintiff,

v.

Tony Henderson, Defendant

Date Filed	#	Docket Text
06/06/2006	1	COMPLAINT as to Tony Henderson. * * *
* * *		
06/07/2006		Arrest of Tony Henderson on 6/7/06. * * *
06/07/2006	3	Minute Entry for proceedings held before Judge Monte C. Richardson :INITIAL appearance as to Tony Henderson held on 6/7/2006. * * *
06/07/2006	4	ORAL MOTION for bond by USA as to Tony Henderson. * * *
* * *		

06/11/2006	8	ORDER Setting Conditions of Release as to Tony Henderson (1) $20,000.00 Secured Signed by Judge Monte C. Richardson on 6/7/06. * * *
06/11/2006	9	Secure BOND entered as to Tony Henderson in amount of $ 20,000.00. * * * Signed by U.S. Deputy Marshal * * *
	* * *	
07/12/2006	15	INDICTMENT returned in open Court as to Tony Henderson (1) count(s) 1, 2-7. * * *
	* * *	
07/19/2006	20	Minute Entry for proceedings held before Judge Howard T. Snyder :ARRAIGNMENT as to Tony Henderson (1) Count 1, 2-7 * * * Defendant pled not guilty. * * *
	* * *	
10/26/2006	34	INDICTMENT returned in open Court as to Tony Henderson (1) count(s) 1s, 2s, 3s-8s. * * *
	* * *	
11/07/2006	37	Minute Entry for proceedings held before Judge Howard T. Snyder :ARRAIGNMENT ON SUPERSEDING INDICTMENT as to Tony Henderson (1) Counts 1, 1s,2-7 ,2s,3s-8s. * * *
	* * *	
09/20/2007	89	INDICTMENT returned in open

		Court as to Tony Henderson (1) count(s) 1ss, 2ss-3ss, 4ss, 5s, 6ss-11ss. * * *
		* * *
10/02/2007	96	Minute Entry for proceedings held before Judge Howard T. Snyder :ARRAIGNMENT ON SECOND SUPERSEDING INDICTMENT as to Tony Henderson (1) Counts 1, 1s,2-7,2s,2ss-3ss,3s-8s,4ss,5ss,6ss-11ss * * * Defendant pled not guilty. * * *
		* * *
10/29/2007	102	MOTION to dismiss *forfeiture allegations as to Counts 6-11 (only) of the Second Superseding Indictment* by USA as to Tony Henderson. * * *
		* * *
11/19/2007	116	ORDER granting 102 government's Motion to dismiss forfeiture allegations aas to counts 6-11; * * * setting case for final status 11/27/07 at 2:00 p.m. * * *
		* * *
11/30/2007	128	PLEA AGREEMENT re: Count Five of the Second Superseding Indictment as to Tony Henderson. * * *
		* * *

12/06/2007	129	ACCEPTANCE OF PLEA of guilty and adjudication of guilt re: count Five of the Second Superseding Indictment as to Tony Henderson. Sentencing set for 3/25/2008 * * * .
	* * *	
03/13/2008	137	Unopposed MOTION to continue *sentencing* by Tony Henderson. * * * .
03/17/2008	138	ORDER granting 137 Defendant Henderson's Unopposed Motion to Continue Sentencing as to Tony Henderson. Sentencing rescheduled to 4/21/08 at 9:30 a.m. * * *
	* * *	
04/09/2008	140	MOTION to dismiss *real property from forfeiture allegation in the second superseding indictment* by USA as to Tony Henderson. * * *
	* * *	
04/16/2008	142	ORDER granting 140 United States' Motion to Dismiss Real Property From Forfeiture Allegation in the Second Superseding Indictment. * * *
	* * *	
03/17/2008	144	Minute Entry for proceedings held before Judge Timothy J. Corrigan: SENTENCING held on 4/21/2008 for Tony Henderson

		(1), Count(s) 1, 1s, 2-7, 2s, 3s-8s, Dismissed; Count(s) 1ss, 2ss-3ss, 4ss, 6ss-11ss, Dismissed on government motion; Count(s) 5ss, Imprisonment: 6 months; Supervised Release: 24 months; Special Assessment: $100.00;.. * * *
	* * *	
04/24/2008	146	JUDGMENT as to Tony Henderson (1), Count(s) 1, 1s, 2-7 , 2s, 3s-8s, Dismissed; Count(s) 1ss, 2ss-3ss, 4ss, 6ss-11ss, dismissed on government motion: Count(s) 5ss, Imprisonment: 6 months; Supervised Release: 24 months; Special Assessment: $100.00. * * *
	* * *	
01/13/2010	150	MOTION for early termination of probation for Tony Henderson (1) Count 5ss by Tony Henderson. * * *
01/20/2010	151	RESPONSE in support by USA as to Tony Henderson re 150 Motion for early termination. * * *
	* * *	

02/17/2010	154	ORDER granting in part 150 Motion for Early Termination of Probation as to Tony Henderson. Defendant shall be discharged from supervised release effective 6/11/10. * * *
07/16/2010	155	MOTION for return of property by Tony Henderson. (Titled: Motion to return/disposition of property). * * *
		* * *
09/03/2010	159	RESPONSE in opposition by USA as to Tony Henderson re 155 Motion for return of property. * * *
09/17/2010	160	ORDER taking under advisement 155 Motion to return property as to Tony Henderson. See order for details. * * *
		* * *
02/03/2011	165	RENEWED MOTION for return/disposition of property by Tony Henderson. * * *
03/17/2011	166	NOTICE *to the Court* by USA as to Tony Henderson * * * .
		* * *
05/16/2011	168	Minute Entry for proceedings held before magistrate Judge Thomas E. Morris: EVIDENTIARY hearing as to Tony Henderson re 165 MOTION for return of property filed by Tony Henderson, 162 MO-

		TION for return of property filed by Tony Henderson, 163 MOTION for return of property filed by Tony Henderson. * * *
05/27/2011	169	REPORT AND RECOMMENDATION as to Tony Henderson. Re 155 MOTION for return of property. * * *
06/07/2011	170	OBJECTION to report and recommendations 169 by Tony Henderson. * * *
08/09/2012	171	ORDER adopting 169 Report and Recommendations, denying (Doc. 155)Defendant's Motion to Return/Disposition of Property and deeming moot (Doc. 165) Defendant's Renewed Motion to Return/Disposition of Property. * * *
09/05/2012	172	NOTICE OF APPEAL by Tony Henderson re 171 Order on Report and Recommendations. * * *
* * *		
09/05/2012	174	MOTION for miscellaneous relief, specifically preserve property pending appeal by Tony Henderson. * * *
* * *		
11/20/2012	176	ORDER * * * granting 174 defendants Motion to Preserve Property Pending Appeal. * * *

* * *		
01/28/2014	186	USCA Opinion as to Tony Henderson re 172 Notice of Appeal. Decision: AFFIRMED. * * *
02/27/2014	187	MANDATE of USCA as to Tony Henderson re 172 Notice of Appeal. * * *

U.S. District Court
Middle District OF Florida
(Jacksonville)

CRIMINAL DOCKET FOR
CASE #: 3:06-mj-01145-MCR-1

USA, Plaintiff,

v.

Tony Henderson, Defendant

Date Filed	#	Docket Text
06/06/2006	1	COMPLAINT as to Tony Henderson. * * *
* * *		
06/07/2006		Arrest of Tony Henderson on 6/7/06. * * *
06/07/2006	3	Minute Entry for proceedings held before Judge Monte C. Richardson :INITIAL appearance as to Tony Henderson held on 6/7/2006. * * *
06/07/2006	4	ORAL MOTION for bond by USA as to Tony Henderson. * * *
* * *		

06/11/2006	8	ORDER Setting Conditions of Release as to Tony Henderson (1) $20,000.00 Secured Signed by Judge Monte C. Richardson on 6/7/06. * * *
06/11/2006	9	Secure BOND entered as to Tony Henderson in amount of $ 20,000.00. * * * Signed by U.S. Deputy Marshal * * *
* * *		
07/12/2006	15	INDICTMENT returned in open Court as to Tony Henderson (1) count(s) 1, 2-7. * * *
11/13/2014	16	TRANSCRIPT of Digitally Recorded Initial Appearance as to Tony Henderson held on June 7, 2006 before Judge Monte C. Richardson. * * *
* * *		

Transcript of Bond Hearing
Before Magistrate Judge
on June 7, 2006
Magistrate Judge's Dkt. No. 16

PROCEEDINGS

June 7, 2006 3:09 p.m.

– – –

[2]

COURT SECURITY OFFICER: All rise. This Honorable Court is now in session. Please be seated.

THE COURT: We're here in case No. 3:06-m-1145-MCR, *United States of America versus Tony Henderson.*

Who speaks for the United States?

MR. BROWN: Rodney Brown for the United States. Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. CHRISTINE: Alexander Christine, law firm of Conn & Christine in St. Augustine, Florida, Judge, for Mr. Henderson.

THE COURT: Welcome, Counsel.

MR. CHRISTINE: Thank you, Judge.

THE COURT: And we're here this afternoon for an initial appearance on a complaint.

Mr. Henderson, I have some questions I need to ask you.

* * *

[3]

How much schooling, education have you completed?

THE DEFENDANT: Bachelor's degree.

THE COURT: So you obviously understand English?

THE DEFENDANT: Yes, I do.

THE COURT: Are you currently under the influence of drugs, alcohol, or any other intoxicants?

THE DEFENDANT: I've taken an anti-inflammatory for my back, Flexeril, earlier, and -- for inflammation, and a muscle relaxant for my back.

THE COURT: You took that this morning?

THE DEFENDANT: A couple of hours ago.

THE COURT: All right. By taking that medication, does it affect your ability to understand what's happening here today?

THE DEFENDANT: It does not.

THE COURT: So you're under the care of a physician?

THE DEFENDANT: Yes, I am.

THE COURT: Have you ever seen a psychiatrist?

THE DEFENDANT: No, I have not.

[4]

THE COURT: Have you ever been treated for a mental illness?

THE DEFENDANT: No, I have not.

THE COURT: All right. So, to your knowledge, do you now suffer from any mental or emotional disability?

THE DEFENDANT: Depression.

THE COURT: You suffer from depression?

THE DEFENDANT: Yes. I mean, I'm depressed.

THE COURT: Were you diagnosed with depression?

THE DEFENDANT: No, I was not, Your Honor.

THE COURT: Have you seen a doctor for your depression?

THE DEFENDANT: No, I have not.

THE COURT: All right. And you're not taking any medication for it?

THE DEFENDANT: No, I 'm not.

THE COURT: All right. So you clearly understand where you are, what you're doing, and the purpose of this proceeding?

THE DEFENDANT: Yes, I do.

THE COURT: All right. The purpose of this hearing, Mr. Henderson, is to advise you of the charge, the rights that you have, and the proceedings that will follow, and to consider the issue of bail.

Now, you won't be called upon to plead to this charge

[5]

at this time, but I will tell you that a criminal complaint has been filed against you, charging you with a violation of Title 21, United States Code, Section 853(a)(2) and Title 21, U.S. Code, Sections 841(a)(1) and 841(b)(1)(D).

What I'll do at this time is ask that the Assistant U.S. Attorney advise you of the charge and the maximum penalties.

MR. BROWN: Mr. Henderson, you've been charged in a one-count complaint that also has a for-

feiture provision. It charges that on or about December 10, 2005, at Macclenny, in Baker County, in the Middle District of Florida, that you knowingly, willfully, intentionally, distributed marijuana, a Schedule I controlled substance, the amount of the marijuana being less than 50 kilograms, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(D).

Further, it charges -- or alleges that certain real property * * * is subject to forfeiture, pursuant to Title 21, United States Code, Section 853 (a)(2), as property used to commit -- or to facilitate the commission of that offense.

If you were to be found guilty of the charge which is set forth in the criminal complaint, you'd face the following maximum penalties.

The maximum term of imprisonment of up to five years, or $250,000 in fines, or both the fines and the term of

[6]

imprisonment, a period of supervised release of up to three years.

And if you were to violate the terms and conditions of that supervised release, you could be sent back to prison for up to two additional years.

There's also a special assessment which is mandatory in the amount of $100. And there's a forfeiture, which I just summarized for you.

THE COURT: Mr. Henderson, do you understand the charge in the complaint?

THE DEFENDANT: Yes, I do.

THE COURT: And do you also understand the maximum penalties possible?

THE DEFENDANT: Yes, I do.

THE COURT: I do need to advise you of your rights. You do have a constitutional right to remain silent. You do not have to make any statement, nor do you have to give a statement at any time to any law enforcement officer. If you do make a statement, anything you say can and will be used against you in court.

If you've already made statements in the past to law enforcement, you need not make any further statements in the future.

Do you understand your right to remain silent?

THE DEFENDANT: Yes, I do.

[7]

THE COURT: And, Mr. Henderson, do you have retained counsel in this?

MR. CHRISTINE: Judge, I got contacted just about two hours ago, so if I could make a limited ap-

pearance for this proceeding.

I probably will be representing Mr. Henderson, but I really haven't had a chance to even speak to him, other than about a three-minute --

THE COURT: I understand.

MR. CHRISTINE: I do know a little bit about his background, his contacts with the community, when you're ready for me to address those.

THE COURT: Okay. Mr. Henderson, you do have a right to be represented by an attorney in all proceedings in this case.

And if you cannot afford to retain an attorney and wish to be represented by one, this court would appoint an attorney to represent you at no cost or obligation.

Because counsel has indicated a limited appearance at this point, until the situation is secure, if there comes a time when you need to have the court consider whether counsel should be appointed, you need to just bring that to the court's attention, and we'll make that determination at that time.

Do you understand your right to counsel?

THE DEFENDANT: Yes, I do.

THE COURT: All right. Do you understand all the rights I've explained?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: What's the government's position with respect to bail?

MR. BROWN: Your Honor, may I confer for just one moment with the pretrial services officer?

THE COURT: Yes.

(Counsel confers with pretrial services officer.)

THE COURT: Before I hear from the government, Mr. Henderson, I also need to advise you that you do have a right to a preliminary hearing since this is a complaint.

At the preliminary hearing the government would have to prove that there's probable cause to believe that a crime has been committed and that you did it.

If the government fails to approve that a crime has been committed then the complaint against you will be dismissed and you'll be discharged.

You do have a right to waive a preliminary hearing if you care to do so, but I only advise you doing so after consulting with your attorney.

Do you understand your right to a preliminary

hearing?

THE DEFENDANT: Yes, I do.

THE COURT: All right. Counsel.

MR. BROWN: Your Honor, as the court is aware, this is

[9]

a serious case, because the charge, essentially, is that a sworn federal law enforcement officer distributed illegal drugs.

However, based upon conference with the defense lawyer, and also with the pretrial services officer, we are prepared to recommend a bond under certain conditions.

This is not the type of case, because of the maximum penalty, that there is a rebuttal presumption in favor of detention.

THE COURT: What's your recommendation?

MR. BROWN: The United States would recommend a $20,000 bond with 10 percent down cash surety, specifically a $2,000 cash bond component.

We would recommend that the court conduct a *Nebbia* inquiry. And in an effort to expedite matters, if the defendant chooses, he may wish to be sworn and to testify about the source of those funds.

I have discussed that with defense counsel. Usually a third-party custodian does that. However, it is possible for the defendant, if the court allows, to do that as well, for the limited purpose of providing the source of the funds.

THE COURT: Okay.

MR. BROWN: There is some peril in that obviously, which I obviously discussed with counsel, that if there is some commingling and/or if the defendant is not truthful -- and I'm

[10]

not suggesting that he wouldn't be, but there could be peril involved in that.

Additionally, Your Honor, we'd recommend that travel be restricted to the Middle District of Florida. We would recommend that the defendant surrender all firearms and all law enforcement credentials, whether they be superseded credentials, badges, what have you. And we would also recommend that the defendant turn over -- I think I said passport.

THE COURT: No. You didn't mention the passport.

MR. BROWN: We'd recommend that he turn over his passport and, of course, not seek to obtain any passport.

Moreover, because there is a forfeiture provision

which goes directly to the defendant's residence, we would ask that he not be -- prohibited from encumbering that residence as a condition of bond without permission or approval of the court upon notice to the United States.

THE COURT: Is that it?

MR ROWN: Other standard terms and conditions, Your Honor.

THE COURT: Okay. Let me hear from defense counsel. What's your position on this?

MR. CHRISTINE: Judge, I think -- I think that's going to be acceptable. I've talked to my client. He would like the court's inquiry and be -- and answer those limited questions.

[11]

He has -- as you heard from the government, he's been an agent here for about 22 years now with no prior record. He's lived in North Florida his entire life. His wife of 17 years and his 13- and 14-year-old child live here in Macclenny.

He's lived in that exact same house for the last 12 years. His mother lives here. All the ties to his community are here. And he'd be happy to answer the inquiry questions about the source of the funds posted for the bond.

THE COURT: Mr. Henderson, you want to take

the stand?

THE DEFENDANT: Sir?

THE COURT: So you want to inquire, Mr. -- Counsel?

MR. BROWN: Actually, Your Honor, it might be more appropriate for the defense counsel to inquire --

THE COURT: All right.

MR. BROWN: -- since he may have more knowledge of the funds than I do at this point.

THE COURT: Then we'll just leave it open to cross-examination.

MR. BROWN: Thank you.

THE COURT: All right.

COURTROOM DEPUTY: Do you solemnly swear that the testimony you're about to give to this court will be the truth, the whole truth, and nothing but the truth, so help you God?

THE DEFENDANT: I do.

COURTROOM DEPUTY: State your full name.

THE DEENDANT: Tony Henderson.

MR. BROWN: Your Honor, just in an abundance of caution, I would just ask perhaps that the court might advise him of his right to remain silent.

Even though the United States concedes that this is for the limited inquiry with regard to the funds, I just don't want there to be a problem down the road with him not being fully advised.

THE COURT: You do understand, Mr. Henderson, that you have a right to remain silent?

THE DEFENDANT: Yes, I do.

MR. CHRISTINE: Mr. Henderson, you've heard the conditions that the government is recommending for bond, which is going to include the posting of some funds.

Can you assure the court that the source of those funds is free from any criminal activity?

THE DEFENDANT: Yes. Oh, I'm sorry. Yes, I can.

MR. CHRISTINE: All right. No further inquiries.

MR. BROWN: Mr. Henderson, can you be more specific about the source of the funds?

THE DEFENDANT: It's my paycheck. It's my

income from my -- it's my monthly income.

MR. BROWN: Okay. And you have a bank account that these funds would come from?

THE DEFENDANT: Yes.

[13]

THE COURT: And what is the bank where that is? What's that bank?

THE DEFENDANT: Mercantile.

THE COURT: Mercantile Bank? Is that in Macclenny or...

THE DEFENDANT: There's a branch here also.

MR. BROWN: Okay. And it's your testimony here today under penalty of perjury that those funds were -- solely come from your income as a border patrol agent?

THE DEFENDANT: Yes, yes.

MR. BROWN: Those are my questions, Your Honor.

THE COURT: Any redirect?

MR. CHRISTINE: No, Sir.

THE COURT: All right. You can step down, sir. The court will impose a bond in the amount of $20,000 secured, which is 10 percent down. The court is satisfied that the source of the funds, pursuant to the *Nebbia* hearing, is legitimate.

Travel is restricted to the Middle District of Florida as a condition of release. You are to surrender all firearms and law enforcement credentials in your possession immediately.

You are to turn over your passport and not apply for a passport during the pendency of this case. And you're not to encumber your residence in any way without approval of the court.

[14]

Do you understand that, sir?

(Counsel confers with defendant.)

THE DEFENDANT: Yes.

THE COURT: Do you understand?

THE DEFENDANT: Yes, I do.

THE COURT: You shall not commit any federal, state, or local offense while on release. And if you do, you need to notify the court or pretrial services immediately.

You shall remain at the address provided to the

court and not change that address without prior permission of the court.

You shall appear at all future court proceedings. There is a separate offense for failure to appear.

Do you understand that, sir?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: And any penalty that you face for failure to appear will be consecutive to whatever penalty you face in the instant case.

Do you understand that as well?

THE DEFENDANT: Yes, I do.

THE COURT: Now, are you willing to --

MR. CHRISTINE: If I could ask you -- just to -- with the court – when he was giving his address, and he's quite nervous, he gave it, I believe, as 1695. It's actually 6195, is what's reflected on the complaint. He just asked me to

[15]

correct that with the court.

THE COURT: Very well.

Are you willing to abide by the conditions, sir?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. Any other recommendations?

MR. BROWN: Your Honor, the court had followed our recommendation about surrendering firearms. Could we make it more specific and just ask that that be done -- I know you indicated immediately, but to either DEA or FBI, or another federal agency working within the -- in connection with this case?

THE COURT: Sure.

MR. BROWN: And that it be done in an orderly manner.

THE COURT: Sure.

Mr. Henderson, you are to surrender your firearms and credentials to DEA or any authorized law enforcement agency in this manner.

Do you understand that, sir?

THE DEFENDANT: Yes, I do.

THE COURT: All right. Anything else, Counsel?

MR. BROWN: No, Your Honor.

THE COURT: All right. Ms. Spaulding will be preparing the bond paperwork. And once she does that, you'll be released.

Court will be in recess.

[16]

COURT SECURITY OFFICER: All rise.

(The digitally recorded proceedings concluded at 3:27 p.m.)

* * *

Order Setting Conditions of Release D.C. Dkt. No. 8

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA	
	ORDER SETTING
V.	**CONDITIONS OF RELEASE**
TONY HENDERSON	**CASE NO. 3:06-M-1145-MCR**

IT IS ORDERED that the release of the defendant is subject to the following conditions:

(1) The defendant **shall not commit** any offense in violation of federal, state or local law while on release in this case and shall report any violations, arrests or convictions to Pretrial Services immediately.

(2) The defendant **shall remain at the address provided to the Court and not change address without prior permission from the Court.**

(3) The defendant **shall appear** at all proceedings as required and shall surrender for service of any sentence imposed as directed. The defendant shall next appear **upon notification by the Clerk of Court.**

ADDITIONAL CONDITIONS OF RELEASE

In order reasonably to assure the appearance of the defendant and the safety of other persons and the community, it is **FURTHER ORDERED** that the release of defendant is subject to the conditions set forth below:

(4) Financial Conditions:

The defendant shall execute a secured bond binding defendant to pay the United States of America the sum of **$20,000.00, with $2,000.00 deposited with the Registry of the Clerk of Court.**

(5) Specific Conditions: The defendant shall:

Abide by the following restrictions on travel: defendant's travel is restricted to Middle District of Florida.

Immediately surrender passport to the Clerk of the United States District Court, and he is not obtain another during the pendency of this case.

Prior to defendant's release the Court must conduct a *Nebbia* hearing to determine the source of collateral being utilized in posting the bond. A *Nebbia* hearing was held and the Court is satisfied that the *Nebbia* requirements have been met as to the source of collateral being utilized in posting the bond.

Other special condition: Defendant is not to encumber his residence without prior permission from the court.

Defendant is required immediately to surrender all law enforcement firearms and credentials to DEA or any other authorized federal agency.

ADVICE OF PENALTIES AND SANCTIONS

TO THE DEFENDANT:

YOU ARE ADVISED OF THE FOLLOWING PENALTIES AND SANCTIONS:

TO THE DEFENDANT:

YOU ARE ADVISED OF THE FOLLOWING PENALTIESA ND SANCTIONS:

A violation of any of the foregoing conditions of release may result in the immediate issuance of a warrant for your arrest, a revocation of release, an order

of detention, and a prosecution for contempt of court and could result in a term of imprisonment, a fine, or both.

The commission of any crime while on pre-trial release may result in an additional sentence to a term of imprisonment of not more than ten years, if the offense is a felony; or a term of imprisonment of not more than one year, if the offense is a misdemeanor. This sentence shall be in addition to any other sentence.

Federal law makes it a crime punishable by up to five years of imprisonment, and a $250,000 fine or both to intimidate or attempt to intimidate a witness, victim, juror, informant or officer of the court, or to obstruct a criminal investigation. It is also a crime punishable by up to ten years of imprisonment, a $250,000 fine or both, to tamper with a witness, victim or informant, or to retaliate against a witness, victim or informant, or to threaten or attempt to do so.

If after release, you knowingly fail to appear as required by the conditions of release, or to surrender for the service of sentence, you may be prosecuted for failing to appear or surrender and additional punishment may be imposed. If you are convicted of:

(1) An offense punishable by death, life imprisonment, or imprisonment for a term of fifteen years or more, you shall be fined not more than $250,000 or imprisoned for not more than ten years, or both;

(2) An offense punishable by imprisonment for a term of five years or more,

but less than fifteen years, you shall be fined not more than $250,000 or imprisoned for not more than five years, or both;

(3) Any other felony, you shall be fined not more than $250,000 or imprisoned not more than two years, or both;

(4) A misdemeanor, you shall be fined not more than $100,000 or imprisoned not more than one year, or both.

A term of imprisonment imposed for failure to appear or surrender shall be in addition to the sentence for any other offense. In addition, a failure to appear may result in the forfeiture of any bond posted.

Acknowledgment of Defendant

I acknowledge that I am the defendant in this case and that I am aware of the conditions of release. I promise to obey all conditions of release, to appear as directed, and to surrender for service of any sentence imposed. I am aware of the penalties and sanctions set forth above.

Date: 6/8/06 /s/

TONY HENDERON

* * *

* * *

DIRECTIONS TO UNITED STATES MARSHAL

(x) The defendant is ORDERED released after processing.

( ) The United States Marshal is ORDERED to keep the defendant in custody until notified by the clerk or judicial officer that the defendant has posted bond and/or complied with all other conditions of release. The defendant shall be produced before the appropriate judicial officer at the time and place specified, if still in custody.

Date: 6/7/06

/s/
MONTE C. RICHARDSON
United States Magistrate Judge

* * *

Motion to Return/Disposition of Property
D.C. Dkt. No. 155

UNITED STATES OF AMERICA
DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

UNITED STATES,

Plaintiff,

v. CASE NO. 03:06-CR-211-J-32HTS

TONY HENDERSON, JUDGE MONTE C. RICHARDSON, MAGISTRATE

Defendant. /

MOTION TO RETURN/DISPOSITION OF PROPERTY

The above defendant, Tony Henderson, pro se, files this Motion for the Return/Disposition of Property. This Motion seeks restoration of the non-possessory interest in property pursuant to U.S. v. Edward L. Brown and Elaine A. Brown, 2010 U.S. Dist. LEXIS 35358, April 9, 2010. In support thereof, the Defendant states the following:

1. On June 8, 2006, Judge Monte C. Richardson requested that I turn over all firearms in my possession to the FBI during the time criminal charges were pending against me.

2. On June 9, 2006, I was provided a property receipt for 19 firearms that were voluntarily turned over to the FBI. (Ex. 1)

3. The above firearms were never found to be involved in any criminal activity. The above firearms were never determined to be purchased from proceeds from criminal activity. No notice of seizure was ever provided citing any statute under which such firearms were to be seized.

4. Upon my plea and subsequent conviction, the FBI considered the property to be abandoned. On February 4, 2009, I transferred my non-possessory interest in the firearms to Robert Rosier. Mr. Rosier filed a claim for the property which was denied after the FBI alleged that I had no right to transfer title or direct a disposition of my firearms due to my conviction for Possession of Marijuana on April 22, 2008. (Ex. 2)

5. On June 3, 2010, I filed an appeal of that decision to the FBI in Washington, D.C. No decision has been made.

In U.S. v. Brown, In Re: Claim of Bernhard Bastian,Jr., 2010 U.S. Dis. LEXIS 35358 (April 9, 2010)(attached), see also U.S. v. 627 Firearms, 589 F. Supp. 2d 1129, 1140 (S.D. Iowa 2008), the facts are virtually identical to the facts in this case. In Brown, the court rejected "the proposition that firearms lawfully owned must, following the owner's unrelated felony conviction, sit wherever they may be, unalienable and wasting, not subject to for-

feiture, not subject to confiscation as contraband and not subject to disposition by the owner, or by anyone else, or by the court for the owner's benefit." The court further rejected "that such property is subject to government confiscation and destruction in the absence of due process or payment of just compensation." The remedy fashioned by the Brown court, the judge exercised equitable powers and ordered the transfer of title to firearms lawfully owned, but later convicted of a felony (which were not subject to forfeiture or confiscation as contraband) for the felon-owner's benefit as outlined

Courts have fashioned solutions that preclude convicted felons from unilaterally dictating or directing disposition of their lawfully owned firearms while avoiding the serious constitutional issues under the *Takings Clause* while protecting the felon-owner's legitimate property interests.

Wherefore, I respectfully request that my spouse, Linda Henderson, be given possession and control of the firearms collection for the benefit of our adult children and heirs. In the alternative, I respectfully request that this court order that Robert Rosier be lawfully entitled to own the subject firearms collection and be awarded possession and control and direct that payment for the firearms be awarded to me as the lawful non-possessory owner.

Dated: June 13. 2010

Respectfully submitted,

/s/
Tony Henderson, Pro Se
* * *

Attachments

FEDERAL BUREAU OF INVESTIGATION

Jacksonville, Florida Division

Facsimile Coversheet

(904)721-1211 (Main) / (904)727-6397 (Fax)

Date: 6/12/06 Fax No.: (904) 829-5943

To: Alexander Christine, Jr.
# of Pages: 3
(Including this sheet)

Attn:

From: S.A. Janet Pellicciotti
(904) 723-6120 / (904) 626-0766

Subject: Property List – Guns

Message: Alex,
Here is the list of guns we took from Tony Henderson. Any problems let me know. Hopefully we will proffer_ today!

/s/
Janet Pellicciotti

* * *

(Exhibit 1)

UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION
Receipt for Property
Received/Returned/Released/Seized

On (date) 6/9/06

Item(s) listed below were:
☑ Received From
☐ Returned To
☐ Released To
☐ Seized

(Name) Tony Henderson
(Street Address) * * *
(City) * * *

Description of
Item(s):

(1) Rugger Special 101 – Serial # 571-46662
5 shot Revolver
(2) Jennys Firearms: 22 (J-22) & magazine
Serial # 187827
(3) Smith & Wesson, .357 magnum
Serial # 72954
(4) Foremost Model 40 – 12 gauge shotgun
Serial # 3078949
(5) Champion – 16 gauge Rifle
Serial # 62850XH
(6) Iver Johnson Slide Autom 22 w/Bushnell
scope Serial # 003561

(7) Smith & Wesson – Border Patrol .357 Magnum
Serial # USBP 1243 & case
(8) Chipmunk .22 Bolt Acton
Serial # 62724
(9) M1 Grand Rifle (WWII)
Serial # C5432
(10) Powermaster Crossbow no serial #
(10) Little Pet 410-Rifle-serial #

JP 6/9/06

Received by: /s/
Janet Pellicciotti

Received From /s/
Tony Henderson

Exhibit 1

UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION
Receipt for Property
Received/Returned/Released/Seized

On (date) 6/9/06

Item(s) listed below were:
☑ Received From
☐ Returned To
☐ Released To
☐ Seized

(Name) Tony Henderson
(Street Address) * * *
(City) * * *

Description of
Item(s):

(11) M1 (Vietnam)-serial # 10567
(12) Remington 550 .22LR Semi-Auto
Serial # 550-6
(13) Mosburg Made 152k .22 long Rifle
Serial# & magazine
(14) M1 Grand Ref # H499 & magazine
(15) Black Powder-wall Hanger [illegible]
f3-126855
(16) Greenfield-Model60 .22
Serial # 24275308 & Scope
(17) Rossie Interarms .22 #K023232
(18) Keltec .40 cal – Serial # 06581 & magazine

(19) 3 M4 magazines

JP 6/9/06

Received by: /s/
Janet Pellicciotti

Received From /s/
Tony Henderson

Exhibit 1

U. S. Department of Justice

Federal Bureau of Investigation

In Reply, Please Refer to
File No. May 21, 2010

CERTIFIED RETURN RECEIPT

TONY HENDERSON
* * *

RE: MISCELLANEOUS FIREARMS – SEE ATTACHED LIST
SEIZURE NUMBER: 3330-10-A-0002
ASSET ID NUMBER: A06-FBI-00141

Dear Mr. Henderson:

Reference the claim for the return of the above referenced property that you filed on January 4, 2010. Your claim has been reviewed and is hereby denied.

A claim for property being abandoned shall not be granted unless the claimant establishes a valid, good faith interest in the property. Title 41, Code of Federal Regulations (C.F.R.), Section 128-48.503(b). The claim must be sworn, must state the interest of the claimant in the property as owner, mortgagee, or otherwise, must be supported by satisfactory documentary evidence, and must include the facts and circumstances justifying the granting of the

claim. 41 C.F.R. § 128-48.503(a).

You have failed to satisfy the regulatory requirements. Assuming *arguendo* that you are the owner of the firearms, our investigation into the merits of your claim confirms your status as a convicted felon. Any firearm possession, actual or constructive, by a convicted felon is prohibited by law. See Title 18, United States Code (U.S.C.), Sections 922(g) and 3665. Therefore, the release of the firearms to you or your designee, Robert Rosier, as you have requested, would place you in violation of federal law, as it would amount to constructive possession. See United States v. Howell, 425 F.3d 971, (11th Cir. 2005); United States v. Felici, 208 F.3d 667, 670 (8th Cir. 2000), *cert. denied* 516 U.S. 897 (1995), *citing* United States v. Sample, 136 F.3d 562 (8th Cir. 1998). Moreover, as you do not have the authority to legally possess firearms, you cannot delegate the authority to any other person. See Howell, 136 F.3d at 977. Consequently, your claim for the release of the subject firearms to Robert Rosier must be denied, as you have failed to establish a valid, good faith interest in the property as required by 41 C.F.R. § 128-48.503.

You may request that the Federal Bureau of Investigation reconsider the denial of your claim. A request for reconsideration must be based on evidence recently developed or not previously considered and must be submitted within ten days of the receipt of this letter denying your claim. See 41 C.F.R. § 128-48.502(e). The request must be ad-

dressed to the Director, Federal Bureau of Investigation, Finance Division, Forfeiture and Seized Property Unit, Suite 510, 935 Pennsylvania Avenue, N W Washington, D.C. 20535, Attention: Lisa Curry

Sincerely,

/s/
Lisa Curry
Property Management Officer

* * *

Exhibit 2

ITEM CONTENTS LIST

Item Seq. No.	Count	Item Description/Serial Number/ Condition/ Item Type/ Disposi-tion Type	Serial No:	Item Value
1	1	Ruger model SP101 5-shot revolver Item Type: Firearms Revolver Condition: Fair	571-46662	$237.51
2	1	Jennings model J-22 pistol Item Type: Firearms Pistol Condition: Fair	187827	$523.84
3	1	Smith & Wesson model 66-2 revolver Item Type: Firearms Re-	AHJ0991	$136.44

		volver Condition: Fair		
4	1	High Standard Foremost model 4011 12-gauge shotgun Item Type: Firearms Shotgun Condition: Fair	307894 9	$82.10
5	1	Iver Johnson's Arms model Champion 16-gauge shotgun Item Type: Firearms Shotgun Condition: Fair	62850 XH	$57.67
6	1	Erma Werke GMBH model EW22 .22-caliber rifle, with Bushnell scope (imported by	003561	$76.77

		Iver Johnson's Arms) Item Type: Firearms Rifle Condition: Fair		
7	1	Smith & Wesson model 66 6-shot revolver, US Border Patrol #1243 Item Type: Firearms Revolver Condition: Fair	7K49862	$136.44
8	1	Rogue Rifle Co. model Chipmunk Actra bolt-action rifle Item Type: Firearms Rifle Condition: Fair	62724	$47.31
9	1	Japanese Arisika 6.5mm rifle,	C5432	$10.00

		nonfunctional Item Type: Firearms Rifle Condition: Poor		
10	1	Powermaster crossbow Item Type: Firearms Other Condition: Poor	none	$50.00
11	1	Savage .410 bore shotgun, engrave "Little Pet" Item Type: Firearms Shotgun Condition: Fair	429HY	$34.83
12	1	U.S. Rifle Arms Corp. USA, Model M1A1 Garand, .308 caliber semi-automatic rifle with three magazines	10667	$1,613.40

		Item Type: Firearms Rifle Condition: Fair		
13	1	Remington model 550-I semi-automatic rifle Item Type: Firearms Rifle Condition: Fair	none	$118.03
14	1	O.F. Mossberg & Sons model 152K rifle, with one magazine Item Type: Firearms Rifle Condition: Fair	none	$76.88
15	1	RFI Enfield Mark III* 7.62 caliber rifle and one magazine Item Type:	H4991	$50.00

		Firearms Rifle Condition: Poor		
16	1	Homemade percussion cap muzzle-loading rifle, nonfunctionalItem Type: Firearms Other Condition: Poor	83-126855	$10.00
17	1	Marlin Firearms Greenfield model 60 rifle with scope Item Type: Firearms Rifle Condition: Fair	24275308	$33.19
18	1	Rossi model M92 rifle (imported by Interarms) Item Type: Firearms Rifle	K023232	$160.20

		Condition: Fair		
19	1	Kel Tec model SUB-2000 semi-automatic submachine gun Item Type: Firearms Machinegun Condition: Fair	06581	$252.75

Seizure Form A06-FBI-00141
Miscellaneous firearms

5/18/10
14:20:23
Pages 1-2 of 2
(Exhibit 2)

Government's Response to Defendant's Motion to Return/Disposition of Property
D.C. Dkt. No. 159

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES
OF AMERICA,

v. Case No. 3:06-cr-211-J-32TEM

TONY HENDERSON

GOVERNMENTS' RESPONSE TO DEFENDANT'S MOTION TO RETURN/DISPOSITION OF PROPERTY

Comes now the United States, by and through the undersigned Assistant United States Attorney, and in filing this response to the defendant's *pro se* "Motion to Return/Disposition of Property," states as follows:

I. Facts

1. On June 7, 2006, the defendant, Tony Henderson, was arrested as a result of a complaint issued in the Middle District of Florida, Jacksonville Division, charging him with distributing marihuana in viola-

tion of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(D). (Dkt. #1)

2. On June 7, 2006, Henderson appeared before Magistrate Judge Monte C. Richardson where, among other things, conditions of bond were set. One of the conditions of bond required Henderson "to surrender all law enforcement firearms and credentials to DEA or any other authorized federal agency." (Dkt. #8)

3. In addition to "law enforcement firearms", Henderson also surrendered approximately 18 personal firearms to the Federal Bureau of Investigation.

4. On July 12, 2006, October 26, 2006 and September 20, 2007, an indictment and superseding indictments were returned by federal grand juries charging Henderson with various violations of Title 21, United States Code. (Dkt. #15, 34, 89)

5. On November 30, 2007, pursuant to a written plea agreement, Henderson entered a guilty plea to count five of the second superseding indictment. Count Five charged Henderson with distributing marihuana in violation of Title 21, United States Code, Section 841(a)(1) and 841(b)(1)(D). (Dkt. #128, 129)

6. On April 24, 2008, Henderson was sentenced to 6 month's imprisonment to be followed by 24 months of supervised release as a result of his felony conviction. One of the conditions of supervised release included, "that the defendant shall not possess

a firearm, ammunition, destructive device, or any other dangerous weapon." (Dkt. #146)

7. On June 11, 2010, Henderson completed his term of supervised release. (Dkt. #154)

8. On July 16, 2010, Henderson filed a motion pursuant to Fed. R. Crim. P. 41(g) for return of property, specifically the weapons surrendered to law enforcement in the summer of 2006. In his motion, Henderson has requested that the Court order the government to relinquish the firearms to Henderson's spouse, Linda Henderson, or to a third party purchaser with the proceeds to go to Henderson. (Dkt #155)

II. Memorandum of Law

District courts have equitable civil jurisdiction over Fed. R. Crim. P. 41(g) return of property motions. This is true even if the all of the criminal proceedings against a defendant have ended. United States v. Martinez, 241 F.3d 1329, 1330-31 (11th Cir. 2001).

In any Rule 41(g) hearing, the court must undertake a multi-step inquiry. First , the defendant must demonstrate that he or she has a possessory interest in the property in question. United States v. Howell, 425 F.3d 971, 974 (11th. Cir. 2005). Next the government may offer evidence that there is, "a legitimate reason to retain the property, does not possess the property, or that the property has been destroyed." United States v. Potes Ramirez, 260 F.3d 1310, 1314

(11th Cir. 2001).

Henderson fails the first step. Although the government concedes that Henderson *had* a possessory interest in the firearms, his possessory interest ended upon his conviction on a felony drug charge on April 6, 2008. It is quite clear that convicted felons cannot possess firearms. Title 18, United States Code, Section 922(g). This also includes constructive possession, which would entail the defendant's spouse or a third party taking the weapons in exchange for cash to Henderson. As the Howell court stated:

> "Federal law prohibits convicted felons from possessing guns...[The defendant] is also not entitled to have the firearms held in trust for him by a third party. Such a request suggests constructive possession. Any firearm possession, actual or constructive, by a convicted felon is prohibited by law." Howell, 425 F.3d 977, quoting United States v. Felici 208 F.3d 667 (8th Cir. 2000).

III. Conclusion

For the reasons stated herein, the motion is due to be denied.

Respectfully submitted,

A. BRIAN ALBRITTON
United States Attorney

By: /s/
RUSSELL C. STODDARD
Assistant United States Attorney

* * *

Government's Notice to the Court of Pending Administrative Action
D.C. Dkt. Nos. 164 & 164-1

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA

v. CASE NO. 3:06-cr-211-J-32TEM

TONY HENDERSON

NOTICE TO THE COURT

Comes now the United States, by and through the undersigned Assistant United States Attorney, and in response to the Court's Order, states as follows:

The petitioner, Tony Henderson, has an administrative action for the return of nineteen weapons pending before the Federal Bureau of Investigation (FBI). A decision in this matter is imminent. The weapons are still being maintained at the FBI Field Office in Jacksonville, Florida (see the attached correspondence dated January 21, 2011).

Respectfully submitted,

ROBERT E. O'NEILL
United States Attorney

By: /s/
RUSSELL C. STODDARD
Assistant United States Attorney

* * *

U. S. Department of Justice

Federal Bureau of Investigation

In Reply. Please Refer to File No. 32256

6061 Gate Parkway
Jacksonville, FL

January 21, 2011

United States Attorney's Office
Middle District of Florida
300 N. Hogan Street, Suite 700
Jacksonville, Florida 32202

Attention: AUSA Russell Stoddard

RE: Tony Henderson
Case No. 3:06-cr-211-J-32TEM

Dear AUSA Stoddard:

As you know, in approximately December 2009, the FBI initiated an abandonment process to resolve the disposition of a number of weapons seized from Mr. Henderson pursuant to his June 2006 arrest on charges of distribution of marijuana, which are in FBI custody. Mr. Henderson filed a claim to the firearms in the abandonment pro-

cess in January 2010. His claim was denied on May 21, 2010, and on June 3, 2010, he filed a request for reconsideration. Mr. Henderson also filed a Motion for Return on July 16, 2010.

FBI-Jacksonville personnel contacted the Legal Forfeiture Unit at FBI HQ on this date and were advised that Mr. Henderson's request for reconsideration is still under review; however, it is being handled as a priority matter, and a ruling is anticipated within a week.

The firearms are being maintained in FBI-Jacksonville's evidence gun vault. They will be so maintained until Mr. Henderson's claim and Motion have been resolved.

If you have any questions, please contact Paralegal Specialist Sharon Snow at (904) 248-7346.

Sincerely yours,

JAMES CASEY
Special Agent in Charge

By: /s/
Ann C. Shannon
A/Associate Division Counsel

Renewed Motion to Return/
Disposition of Property
D.C. Dkt. No.165

UNITED STATES OF AMERICA
DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

UNITED STATES,

Plaintiff,

v. CASE NO. 03:06-cr-211-J-32TEM

TONY HENDERSON, JUDGE THOMAS E. MORRIS
UNITED STATES MAGISTRATE

Defendant. /

RENEWED MOTION TO RETURN/DISPOSITION OF PROPERTY

The above defendant, Tony Henderson, pro se, files this Renewed Motion for the Return/Disposition of Property. This Motion seeks restoration of the non-possessory interest in property pursuant to United States v. Edward L. Brown and Elaine A. Brown, Case 1:06-cr-00071-SM, Document 318, April 9, 2010.

I am in receipt of the FBI response to my administrative request for the return of my property to a

person entitled to legally possess firearms under state and federal law. The response was a denial based on my abandonment of property citing 41 CFR 128-48.02. The FBI failed to follow its own procedures relating to notifying me that the property was seized. 41 CFR 128-48.102-1(b).

1. On June 7, 2006, I was arrested as a result of a complaint issued in the Middle District of Florida, Jacksonville Division, charging me with distributing marijuana in violation of Title 21, United States Code, Sections 841(a)(1) and 841 (b)(1)(D).

2. On June 7, 2006, I appeared before Magistrate Judge Monte C. Richardson, where bond conditions were set. One of the conditions of bond required that I was "to surrender all law enforcement firearms and credentials to DEA or any other authorized federal agency."

3. In addition to "law enforcement firearms", I also voluntarily surrendered 19 personal firearms to the Federal Bureau of Investigation for safekeeping and as a condition of bond and while charges were pending against me.

4. On June 9, 2006, I was provided a property receipt Form FD-597 for the 19 firearms that were "received from" me and voluntarily turned over to the FBI. (Ex. 1)

5. On November 20, 2007, pursuant to a written plea agreement, I entered a guilty plea to distrib-

uting marijuana in violation of Title 21, United States Code, Section 841(a)(1) and 841(b)(1)(D).

6. On April 21, 2008, I was given a sentence of six months imprisonment, which was served, followed by a period of supervised release of 24 months. The supervised release term was subsequently shortened to terminate on June 11, 2010.

7. Beginning November, 2008, I contacted FBI via telephone and inquired about what procedures I would have to do in order to transfer possession and ownership of the property that they had "received from" me on June 9, 2006. I was told to submit a written letter explaining the details of the case along with a "bill of sale" and contact information of the person whom I wished the property to go to.

8. On February 4, 2009, I contacted Mr. Robert Rosier concerning transferring my "non-possessory" interest in the firearms. On February 4, 2009, Robert Rosier agreed to would take possession and ownership of all firearms. A "Bill of Sale" was signed and submitted to the FBI by Mr. Rosier and myself. Mr. Rosier contacted the FBI who advised they would contact him about taking possession.

9. On December 14, 2009, I contact the FBI considering making arrangement with Mr. Rosier in order to complete the process. I was told by Agent Eubanks that the FBI was aware of my request and they trying to work with the U.S. Attorney's Office regarding the situation and they would be contacting me.

10. By letter from the FBI dated December 16, 2009, I was advised that the FBI seized my property on June 9, 2006. I was advised that I would have thirty days from the date postmarked on the letter to claim the property. If the property is not claimed by this date, title to the property will vest in the United States in accordance with Title 41, C.F.R, Section 128-48.102-1.

11. Although the notice of seizure was received three years six months and seven days after the property was "received from" me, I was not convicted until after a plea agreement on November 30, 2007 and sentenced on April 21, 2008. Mr. Rosier and I filed a claim on December 28, 2009 to FBI Agent Janet Pellicciotti. The written claim included a statement of facts and circumstances justifying granting the claim. Additionally, the claim was supported by documentary evidence establishing valid, good faith interest in the property.

12. On January 5, 2010, I received a letter from FBI Chief Division Counsel stating that they were conducting an investigation into the merits of my claim.

13. On May, 21, 2010, I received a letter from FBI Property Management Officer stating that the claim I filed on January 4, 2010 was reviewed and is hereby denied. They stated that since I did not have the authority to legally possess firearms, I cannot delegate the authority to any other person. Consequently, my claim for the release of the firearms to Robert Rosier is denied, as I have failed to establish a valid,

good faith interest in the property as required by 41 C.F.R. Section 128-48.503.

14. On June 3, 2010, I contacted FBI Forfeiture & Seized Property Unit via USPS requesting a reconsideration.

15. On January 26, 2011, I received a letter from FBI Property Management Officer stating that my request for reconsideration is denied pursuant to Title 41, C.F.R. Section 128-48.502.

16. My conviction was unrelated to the surrendered firearms. The firearms were voluntarily turned over to the FBI for safekeeping and as a condition of bond. The firearms are no longer held as a condition of bond. I was never advised that by voluntarily turning them over would render them "seized or abandoned."

17. The firearms were never found to be involved in any criminal activity, nor were ever determined to have been purchased from proceeds from criminal activity. The firearms at issue do not constitute contraband and are not subject to forfeiture.

18. I still hold legal title to the property at issue because the transfer of title cannot be completed by Mr. Rosier, and I acquired title before the government alleged any criminal activity.

18. The firearms were never seized, forfeited, abandoned or considered unclaimed personal property. I inquired about the firearms on November, 2008, pri-

or to receiving notice of seizure on December 16, 2009, that the firearms were seized on June 9, 2006.

19. I was not given notice within 30 days of June 9, 2006 that the firearms were considered seized and offered a right to file a claim or transfer ownership.

20. No notice of seizure was ever provided citing any statute under which such firearms were to be seized.

21. The firearms were not party of any indictment, nor were they ever forfeited in this criminal case. There was no forfeiture provision or plea agreement where I agreed to forfeit any assets.

22. The firearms were not involved as part of any search and seizure.

It is recognized that there is a split in the circuits over whether it is possible for the Government to retain possession of a firearm following a criminal conviction without initiating formal forfeiture proceedings. However, several circuits hold that if a forfeiture is barred by failure to commence action within an appropriate timeframe, and the owner stands as a convicted felon, the owner continues to have a property interest in the firearms which must be accommodated by the sale, transfer or storage of the firearms in spite of his own possessor rights having been curtailed. U.S. v. Miller, 588 F.3d 418 (7th Cir. 2009); Watts v. U.S., 2002 WL 999320 (N.D. Tex 2002).

Directly on point is the more recent case, U.S. v.

Brown, In Re: Claim of Bernhard Bastian,Jr., Case 1:06-cr-00071-SM Document 318, April 9, 2010, see also U.S. v. 627 Firearms, 589 F. Supp. 2d 1129, 1140 (S.D. Iowa 2008) where the facts are virtually identical to the facts in this case. In Brown, the Judge issued an order stating, "*The weapons* surrendered by defendant, as a bail condition are no longer held as a condition of bail (defendant violated bail and has been convicted and sentenced). They may be transferred by defendant to anyone who may legally possess them". Moreover, the disposition of property held as a condition of bail is a matter falling well within the court's jurisdiction.

The court rejected "the proposition that firearms lawfully owned must, following the owner's unrelated felony conviction, sit wherever they may be, unalienable and wasting, not subject to forfeiture, not subject to confiscation as contraband and not subject to disposition by the owner, or by anyone else, or by the court for the owner's benefit." The court further rejected "that such property is subject to government confiscation and destruction in the absence of due process or payment of just compensation." The remedy fashioned by the Brown court, the judge exercised equitable powers and ordered the transfer of title to firearms lawfully owned, but later convicted of a felony (which were not subject to forfeiture or confiscation as contraband) for the felon-owner's benefit. U.S. v. Approximately 627 Firearms, 589 F. Supp. 2d 1129, 1140 (S.D. Iowa 2008).

Courts have fashioned solutions that preclude convicted felons from unilaterally dictating

or directing disposition of their lawfully owned firearms while avoiding the serious constitutional issues under the *Takings Clause* while protecting the felon-owner's legitimate property interests.

Wherefore, I respectfully request that my spouse, Linda Henderson, be given possession, title and control of the firearms collection for the benefit of our adult children and heirs. In the alternative, I respectfully request that this court order Mr. Robert Rosier ownership, title and possession as a person who is lawfully entitled to own the subject firearms collection, and direct that payment for the firearms be awarded to me as the lawful non-possessory owner.

Dated: February 02, 2011

Respectfully submitted,

/s/

Tony Henderson, Pro Se

* * *

[Attachment omitted here because it duplicates the document reprinted at pp. 43-46, *supra*.]

Government Notice to the Court Concerning Exhaustion of Administrative Remedies D.C. Dkt. No. 166

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES
OF AMERICA,

v. Case No. 3:06-cr-211-J-32TEM

TONY HENDERSON

NOTICE TO THE COURT

Comes now the United States, by and through the undersigned Assistant United States Attorney, and in providing this Notice to the Court, states as follows:

On January 26, 2011, a final administrative order was entered denying the defendant's petition for return of weapons in the custody of the Federal Bureau of Investigation. The defendant has now exhausted all of the available administrative remedies.

Respectfully submitted,

ROBERT E. O'NEILL
United States Attorney

By: /s/
RUSSELL C. STODDARD
Assistant United States Attorney

* * *

Clerk's Minutes Containing Exhibits
for May 16, 2011 Hearing
D.C. Dkt.No. 168

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES
OF AMERICA

-VS-

CASE NO. 03:06-CR-211(S2)-J-32TEM

TONY HENDERSON
a/k/a "Hollywood"

Defense Atty.: Tony Henderson, *Pro Se*
AUSA: Russell C. Stoddard

JUDGE	Thomas E. Morris U.S. Magistrate Judge	DATE AND TIME	5/16/2011 2:07 – 3:07
DEPUTY CLERK	Carol Holliman	TAPE/ REPORTER	Scott Gamertsfelder Official Court Reporter DIGITAL
INTERPRETER		PRETRIAL/ PROBATION:	None Present

CLERK'S MINUTES

PROCEEDINGS: EVIDENTIARY HEARING FOR PRESENTATION OF EVIDENCE AND ORAL ARGUMENT ON DEFENDANT'S RENEWED MOTION FOR RETURN OF PROPERTY (DOC. 162)

Mr. Henderson placed under oath.

Defendant's exhibits – 1-15 admitted – attached to minutes.

Arguments by government and Mr. Henderson.

Order to Enter

MARK ROSENBLUM, P.A.

Mark Rosenblum, P.A.
500 North Ocean Street
Jacksonville, Florida 32202
www.markrosenblum.com
markrosenblumlaw@bellsouth.net

Office 904.354.6002
Direct 904.354.7228
Facsimile 904.354.6637

June 13, 2008

Russell Stoddard, Esq.
Assistant United States Attorney
United States Courthouse
300 N. Hogan Street
Jacksonville, FL 32202

Re: Tony Henderson

Dear Russ:

When Tony Henderson was released on bond he surrendered the firearms contained in his house to law enforcement. He knows, of course, that he is prohibited from possessing the firearms, and therefore would like to make arrangements for his mother, who lives in Panama City, to get them. Please let me know what steps need to be taken to transfer the firearms. Enclosed is a list of the firearms, which as you can see was prepared by the FBI at the time Henderson turned them over.

Yours very truly,

/s/
Mark Rosenblum

* * *

December 17, 2008 Case#3:06-cr-211-J-32HTS

Agent in Charge
Federal Bureau of Investigation
7820 Arlington Expressway Suite 200
Jacksonville, FL 32211

Dear Agent in Charge,

SUBJECT: TRANSFER OF FIREARMS

On 6/7/06 I was arrested by the FBI and DEA. On or about 6/8/06 Judge Monte C. Richardson requested that I turn over all of firearms over to FBI. On 6/9/06 Agents Janet Pellicciotti and J. Douglas Mathews met with my Attorney Alex Christine and I at my residence * * * I voluntarily turned all my firearms as noted on attached forms FD-597 and FD-302. On 11/30/07 I pled guilty to 21 U.S.C. 841(a) (1) and 841 (b) (1) (D), Distribution of Less Than 50 Kilograms of Marijuana. On 4/21/08 I was sentenced to six months imprisonment, four months house arrest and two years supervised probation.

On 12/1/08 I transferred possession and ownership of all firearms listed on attached form FD-597 to William Boggs * * *. A bill of sell is attached. Please contact my wife Linda Henderson in writing * * * or by phone * * *, and indicate when the property may be transferred. Thank you for your cooperation in this matter.

Sincerely,

/s/
Tony Henderson

* * *

FIREARM BILL OF SALE

Buyer certifies that they are not restricted or forbidden by law to own a firearm and buyer states that he/she:

- **Has NEVER been convicted in any court of a crime punishable by imprisonment for a term exceeding 1 year.**
- **Is NOT a fugitive from justice.**
- **Is NOT an unlawful user of or addicted to any controlled substance.**
- **Has NEVER been adjudicated as a mental defective or has never been committed to a mental institution.**
- **Is NOT an alien illegally or unlawfully in the United States or an alien admitted to the United States under a nonimmigrant visa.**
- **Has NOT been discharged from the Armed Forces under dishonorable conditions.**
- **Having been a citizen of the United States, has NEVER denounced his or her citizenship.**
- **Is NOT subject to a court order that restrains the person from harassing, stalking, or threatening anyone.**
- **Has NOT been convicted of a misdemeanor crime of domestic violence.**
- **CAN lawfully receive, possess, and transport a firearm.**
- **Is NOT a person who is under indictment or information for a crime punishable by im-**

prisonment for a term exceeding 1 year.

I truthfully state that I AM NOT a person who cannot legally buy, receive, and posse's firearms and/or ammunition.

Full Name William Boggs

/s/ Date 12-1-08
WILLIAM C. BOGGS

Firearm(s) sold

ALL FIREARMS AND PROPERTY AS INDICATED ON FBI FORMS FD-302 AND FD-597

As of 01/26/09 this bill of sale is null and void. Ownership reverts back to original owner.

_____ 01/26/09

/s/
TONY HENDERSON 01/26/09

Buyer
(NAME) **William Boggs**
(ADDRESS) *** * ***

(DL#) * * *
(Contact#) * * *

Seller
(NAME) **Tony Henderson**
(ADDRESS) * * *
(DL#) * * *
(Contact#) * * *

I understand the firearm is sold AS-IS and no warranty has been implied or given. Firearm should be inspected by a Competent gun smith prior to using. Seller not responsible for any damages incurred or caused by the use of this firearm.

Buyer Signature:

/s/
WILLIAM C. BOGGS

Date 12-1-08

Seller Signature:

/s/
TONY HENDERSON

Date 12-1-08

March 2, 2009 Case#3:06-cr-211-J-32HTS

Agent in Charge
Federal Bureau of Investigation
7820 Arlington Expressway Suite 200
Jacksonville, FL 32211

Dear Agent in Charge.

SUBJECT: TRANSFER OF FIREARMS

On 12/1/08 I transferred possession and ownership of all firearms listed on attached form FD-597 to William Boggs * * *

On 1/26/09 William Boggs informed the FBI and myself that he did not want to take possession and ownership of the firearms. So the bill of sale is now null and void.

On 2/4/09 I spoke with Robert Rosier about transferring possession and ownership of all firearms listed on the attached form FD-597. Mr. Rosier informed me that he has contacted your office and inquired about taking possession of the firearms. The case Agent was going to contact him regarding the firearms, but has not done so as of 3/2/09.

Please contact my wife Linda Henderson * * * and Robert Rosier * * *, and indicate when the property may be transferred. Thank you for your cooperation in this matter.

Sincerely,

/s/

Tony Henderson

* * *

FIREARM BILL OF SALE

Buyer certifies that they are not restricted or forbidden by law to own a firearm and buyer states that he/she:

- **Has NEVER been convicted in any court of a crime punishable by imprisonment for a term exceeding 1 year.**
- **Is NOT a fugitive from justice.**
- **Is NOT an unlawful user of or addicted to any controlled substance.**
- **Has NEVER been adjudicated as a mental defective or has never been committed to a mental institution.**
- **Is NOT an alien illegally or unlawfully in the United States or an alien admitted to the United States under a nonimmigrant visa.**
- **Has NOT been discharged from the Armed Forces under dishonorable conditions.**
- **Having been a citizen of the United States, has NEVER denounced his or her citizenship.**
- **Is NOT subject to a court order that restrains the person from harassing, stalking, or threatening anyone..**
- **Has NOT been convicted of a misdemeanor crime of domestic violence.**
- **CAN lawfully receive, possess, and transport a firearm.**
- **Is NOT a person who is under indictment or information for a crime punishable by im-**

prisonment for a term exceeding 1 year.

I truthfully state that I AM NOT a person who cannot legally buy, receive, and posse's firearms and/or ammunition.
I understand that the seller has been convicted of a felony and cannot possess any firearms.

Firearm(s) sold

ALL FIREARMS AND PROPERTY AS INDICATED ON ATTACHED FBI FORMS FD-597

Seller certifies that:

- None of the weapons are prohibited or illegally altered.
- None have been reported lost, stolen or used in any crime.
- He is legally entitled to sell and/or transfer title of his firearms.
- He has been convicted of a felony and cannot own or possess any firearm.
- Transfers sole ownership and possession of property to buyer.

Buyer:

(NAME)	**Robert L. Rosier**
(ADDRESS)	* * *
(DL#)	* * *
(Contact #)	* * *

Seller:

(NAME)	**Tony Henderson**
(ADDRESS)	* * *
(DL#)	* * *
(Contact #)	* * *

Buyer: **Robert L. Rosier**
Signature: /s/
Date: 02/04/09

Seller: **Tony Henderson**
Signature: /s/
Date: 02/04/09

April 6, 2009 Case#3:06-cr-211-J-32HTS

Agent in Charge
Federal Bureau of Investigation
7820 Arlington Expressway Suite 200
Jacksonville, FL 32211

Dear Agent in Charge,

SUBJECT: TRANSFER OF FIREARMS

On 12/1/08 I transferred possession and ownership of all firearms listed on attached form FD-597 to William Boggs * * *

On 1/26/09 William Boggs informed the FBI and myself that he did not want to take possession and ownership of the firearms. So the bill of sale is now null and void.

On 2/4/09 I spoke with Robert Rosier about transferring possession and ownership of all firearms listed on the attached form FD-597. Mr. Rosier informed me that he has contacted your office and inquired about taking possession of the firearms. The case Agent was going to contact him regarding the firearms, but has not done so as of 4/6/09.

Could you or the case Agent please contact my wife Linda Henderson * * * and Robert Rosier * * *, and indicate when the property may be transferred. I would very much like to get this taken care of as

soon, and if any way possible. Thank you for your co-operation in this matter.

Sincerely,

/s/

Tony Henderson

* * *

December 14, 2009 Case#3:06-cr-211-J-32HTS

Agent in Charge
Federal Bureau of Investigation
6061 Gate Parkway
Jacksonville. FL 32256

Dear Agent in Charge,

SUBJECT: TRANSFER OF FIREARMS

I have made several good faith attempts with your office to try and transfer the possession and ownership of my firearms. that were voluntarily turned to your office on June 09, 2006.

On 12/01/08 I transferred possession of ownership of all firearms listed on form FD-597 to William Boggs
* * *

On 01/24/09 your office contacted Mr. William Boggs concerning taking possession of the firearms.

On 01/26/09 Mr. Boggs informed the FBI and myself that he did not want to take possession and ownership of the firearms. So the bill of sale became null and void.

On 02/04/09 I spoke with Mr. Robert Rosier located at 6222 Hunters Lane, St. Augustine, FL 32092 about taking possession and ownership of the firearms. Mr. Rosier stated that he would take owner-

ship. Mr. Rosier has contacted your office twice that I am aware of and given you all his personal information. Mr. Rosier can be contacted at * * *

I have contacted your office on several occasions and spoke with the duty Agent trying to get an answer as to why I am not being allowed to turn over the firearms.
04/22/09 1:00pm Agent (would not give name)
04/30/09 11:00am Agent (would not give name)
05/13/09 11:00am Agent (would not give name)
06/22/09 2:30pm Agent Rusty

On 12/14/09 at 11:00am I again contacted your Office and spoke with Agent Ubanks. Agent Ubanks informed me that the FBI was aware of my request and they would be contacting me. I ask Agent Ubanks how come it only took approximately 3 weeks for them to approve Mr. Boggs to take possession of the fireams, but now they would not allow me to turn them over to Mr. Rosier. He said that he did not know, but they were trying to work with the US Attorney's Office regarding the situation. I requested to speak with a supervisor and was denied to speak with anyone else.

Could you or the case Agent please contact my wife Linda Henderson at * * *, and Robert Rosier at * * *, and indicate when the property may be transferred. If you are unable to allow me to transfer the property, could you please contact me by phone or in writing and explain why not. I would like to get this taken care of if any way possible. Thank you for your

cooperation in this matter.

Sincerely,

/s/

Tony Henderson

* * *

U. S. Department of Justice

Federal Bureau of Investigation

In Reply, Please Refer to
File No.
32256

6061 Gate Parkway
Jacksonville, FL

January 5, 2010

Mr. Tony Henderson
* * *

RE: Miscellaneous firearms
FBI Abandonment No. 3330-2010-A-0002
Asset ID No. A06-FBI-00141

Dear Mr. Henderson:

The Federal Bureau of Investigation (FBI), Jacksonville Division, is in receipt of your January 4, 2010, claim of ownership for the above-captioned weapons.

The FBI is conducting an investigation into the merits of your claim. You will be advised in writing of the ruling on the claim.

If you have any questions, you may contact

Paralegal Specialist Sharon K. Snow, telephone number (904) 248-7000.

Very truly yours,

JAMES CASEY
Special Agent in Charge

By: /s/
Timothy A. Adams
Chief Division Counsel

U. S. Department of Justice

Federal Bureau of Investigation

December 16, 2009

Certified, Return Receipt

Mr. Tony Henderson
* * *

RE: Asset ID Number: A06-FBI-00141
Asset Description: Miscellaneous firearms
(See Attached List)
Abandonment Number: 333010A002

Dear Mr. Henderson:

On June 9, 2006, the Federal Bureau of Investigation (FBI) seized the above referenced property.

You are hereby advised that you have thirty (30) days from the date postmarked on this letter to claim the above-described property. If the property is not claimed by this date, title to the property will vest in the United States in accordance with Title 41, Code of Federal Regulations

(C.F.R.), Section 128-48.102-1.

To claim the property, you must submit a written claim, sworn under penalty of perjury, to Special Agent Janet Pellicciotti, 6061 Gate Parkway, Jacksonville, FL 32256, telephone number 904-248-7348. Pursuant to 41 C.F.R., Section 128-48.503, the claim must include a statement of facts and circumstances that justify granting the claim. Additionally, the claim must be supported by documentary evidence establishing your valid, good faith interest in the property. Upon the receipt of the claim, the FBI will conduct an investigation into the merits of the claim. **Be advised that federal law prohibits anyone convicted of a felony from possessing a firearm.** See Title 18, United States Code, Section 922. Furthermore, no firearm will be returned without documentary proof of ownership.

This will be the only notice that you receive concerning this property.

Very truly yours,

James Casey
Special Agent in Charge

By: /s/
Timothy A. Adams
Chief Division Counsel

FEDERAL BUREAU OF INVESTIGATION
WAIVER OF OWNERSHIP OF FIREARM
Asset ID: A06-FBI-00141

On June 9, 2006, the Federal Bureau of Investigation seized Miscellaneous firearms (See Attached List) from Tony Henderson * * *. I understand that the Code of Federal Regulations (C.F.R.) requires that FBI inform me that I have the opportunity to claim this firearm (41 C.F.R. 128-48.102-1). I understand that if I do not claim this firearm within 30 days of signing this document, the title to the firearm will vest in the United States Government.

( ) I hereby acknowledge receipt of the notice that I have a right to claim this firearm.

( ) I hereby knowingly and voluntarily waive any right, title and interest in the firearm and agree not to contest the vesting of title in the United States Government.

I unconditionally release and hold harmless the FBI, its officers, employees and Agents, from any and all claims, demands, damages, causes of actions or suits, of whatever kind and description, and wheresoever situated, that might now exist or hereafter exist by reason of or growing out of or affecting, directly or indirectly, the seizure or waiver of ownership interest in the described firearm.

Name:

_____

Address:

_____

Telephone:

_____

Date of Birth:

_____

SSN:

_____

Signature:

_____

Date:

_____

Witness:

_____

Signature:

_____

Title:

_____

Date:

_____

Mr. Henderson

Item List for Abandonment Notice

December 16, 2009 (2:22PM)

Abandonment No: 333010A002

ASSET ID		ITEM DESCRIPTION	ITEM VALUE	VIN/ SERIAL NO
A06-FBI-00141	1	Ruger model SP101 5-shot revolver	237.51	571-46662
	1	Jennings model J-22 pistol	523.84	187827
	1	Smith & Wesson model 66-2 revolver	136.44	AHJ0991
	1	High Standard Foremost model 4011 12-gauge shotgun	82.10	3078949
	1	Iver Johnson's Arms model Champion 16-gauge shotgun	57.67	62850XH
	1	Erma Werke GMBH model EW22 .22-caliber rifle,	76.77	003561

		with Bushnell scope (imported by Iver Johnson's Arms)		
	1	Smith & Wesson model 66 6-shot revolver, US Border Patrol #1243	136.44	7K49862
	1	Rogue Rifle Co. model Chipmunk Actra bolt-action rifle	47.31	62724
	1	Japanese Arisika 6.5mm rifle, nonfunctional	10.00	C5432
	1	Powermaster crossbow	50.00	none
	1	Savage .410 bore shotgun, engraved "Little Pet"	34.83	429HY
	1	U.S. Rifle Arms Corp. USA, Model M1A1 Garand, .308 caliber semi-automatic rifle with three	1613.40	10667

		magazines		
	1	Remington model 550-I semi-automatic rifle	118.03	none
	1	O.F. Mossberg & Sons model 152K rifle, with one magazine	76.88	none
	1	RFI Enfield Mark III* 7.62 caliber rifle and one magazine	50.00	H4991
	1	Homemade percussion cap muzzle-loading rifle, nonfunctional	10.00	83-126853
	1	Marlin Firearms Greenfield model 60 rifle with scope	33.19	24275308
	1	Rossi model M92 rifle (imported by Interarms)	160.20	K023232
	1	Kel Tec model SUB-2000 semi-automatic	252.75	06581

		submachine gun		

* * *

December 28, 2009

Special Agent Janet Pellicciotti
6061 Gate Parkway
Jacksonville, FL 32256

Ref:	Asset ID Number:	A06-FBI-00141
	Asset Description:	Miscellaneous firearms
	Abandonment Number:	333010A002

Dear Agent Pellicciotti:

Pursuant to the letter dated December 16, 2009, I hereby make a claim for the above property.

First, let me point out that at no time was I advised that my property was "seized" on June 9, 2006. I was never given notice under the statute of that "seizure" I was asked to voluntarily turn over any weapons that I owned until the resolution of criminal charges. The items were not evidence in the trial and were never identified as proceeds of any illegal activity. There is no basis for "seizure" of the property. In a fact, at the time I voluntarily turned over my property, I was given a property receipt, copy attached which listed the items and identified them as "received from" and the "seized" box was not checked. Additionally, the property has not been abandoned by me as numerous letters and notes indicate I have been trying to transfer of my property to a person who has no involvement in my criminal case and has

no statutory bar from possessing the property. Rather, I have been frustrated in my attempts to transfer my property and have been provided no assistance in resolving this matter.
Rather than argue the fine points of proper seizure authority and subsequent notice, I wish to finally resolve this matter. As advised by you, I have a right to submit a written claim for the property and do so by this writing and attached form. The attached receipt is the documentary evidence that the property was received from me. The firearms have been owned by me for many years. Many were given to me by family members and some were given to me by friends over the years. None of the weapons are prohibited or illegally altered and none have been lost, stolen or used in any crime. I am aware that because I have been convicted of a felony, I may not possess my firearms, however, I am legally entitled to sell and/or transfer title of my firearms as any other legal owner.

Therefore, I am claiming the property as "received from" me by the FBI on June 9, 2006, has been legally transferred to Robert Rosier, * * *. Mr. Rosier has been provided a Bill of Sale for all of the property currently being held as under the above Asset ID Number. Mr. Rosier will be filing a claim and in the event that Mr. Rosier's claim is granted and the property is released to him, I relinquish any property interest I have in the firearms. In the event that Mr. Rosier's claim is denied for any reason, I hereby retain my interest in the property and file this claim and my right to

transfer my interest to a person of my choosing.

Because this property has not been properly seized, I have drafted a settlement agreement for your consideration to resolve all issues related to the listed firearms.

Please contact me as to how to proceed to a mutually agreeable resolution.

/s/ 12/28/09
Tony Henderson

* * *

Attached Claim Form
Attached Proposed Settlement Agreement

* * *

FEDERAL BUREAU OF INVESTIGATION
WAIVER OF OWNERSHIP OF FIREARM
Asset ID: A06-FBI-00141

On June 9, 2006, the Federal Bureau of Investigation seized Miscellaneous firearms (See Attached List) from Tony Henderson * * * I understand that the Code of Federal Regulations (C.F.R.) requires that FBI inform me that I have the opportunity to claim this firearm (41 C.F.R. 128-48.102-1). I understand that if I do not claim this firearm within 30 days of signing this document, the title to the firearm will vest in the United States Government.

(x) I hereby acknowledge receipt of the notice that I have a right to claim this firearm.

( ) I hereby knowingly and voluntarily waive any right, title and interest in the firearm and agree not to contest the vesting of title in the United States Government.

I unconditionally release and hold harmless the FBI, its officers, employees and Agents, from any and all claims, demands, damages, causes of actions or suits, of whatever kind and description, and wheresoever situated, that might now exists or hereafter exist by reason of or growing out of or affecting, directly or indirectly, the seizure or waiver of ownership interest in the described firearm.

Name: Tony Henderson

Address: * * *

Telephone: * * *

Date of Birth: * * *

SSN: * * *

Signature: /s/
TONY HENDERSON

Date: 12/28/09

Witness: Linda L. Henderson

Signature: /s/
LINDA L. HENDERSON

Title: Wife

Date: 12/28/09

SETTLEMENT, INDEMNIFICATION, AND HOLD HARMLESS AGREEMENT

Federal Bureau of Investigation
No.: A06-FBI-00141

Assest Description:
Miscellenous firearms – attached list

Abandonment Number: 333010A002

Claimant: Tony Henderson

1. On or about June 9, 2006, U.S. Department of Justice, Federal Bureau of Investigation (FBI) received the above referenced property owned by Tony Henderson as voluntarily turned over pending a criminal investigation unrelated to the above firearms.

2. On or about December 28, 2009, Tony Henderson filed a claim for the listed property.

3. U.S. Department of Justice and Tony Henderson agree to settle the claim in the following manner: (1) Tony Henderson agrees to withdraw his claim to the claimed firearms and (2) within 30 days of the execution of this agreement, the listed miscellaneous firearms will be returned to Robert Rosier, * * * upon presenting personal identification and a Bill of Sale to the Federal Bureau of Investigation, Jacksonville, Florida 32211.

4. By signing this agreement, Tony Henderson's

claim is withdrawn.

5. Tony Henderson does not contest that U.S. Department of Justice, FBI has authority to turn over the above referenced property to Robert Rosier.

6. Tony Henderson hereby releases and forever discharges the United States, its officers, agents, servants, and employees, its heirs, successors, or assigns, from any and all actions, suits, proceedings, debts, dues, contracts judgments, damages, claims, petitions, and/or demands whatsoever in law or equity which Tony Henderson, his heirs, successors, or assigns ever had now have, or may have in the future in connection with the possession, detention, seizure, and/or release of the above listed property.

7. Tony Henderson agrees to hold and save the United States, its officers, agents, servants, and employees, its heirs, successors, or assigns, harmless from any claims by any others, including costs and expenses, for or on account of any and all lawsuits or claims of any character whatsoever in connection with the possession, detention, seizure, and/or release of the above listed property.

/s/	12/28/09
Tony Henderson	Date

SETTLEMENT, INDEMNIFICATION, AND HOLD HARMLESS AGREEMENT

Federal Bureau of Investigation
No.: A06-FBI-00141
Assest Description: Miscellenous firearms – attached list
Abandonment Number: 333010A002
Claimant: Tony Henderson
Signature Page -2-

_____ _____

For U.S. Department of Justice Date
Federal Bureau of Investigation

FIREARM BILL OF SALE

Buyer certifies that they are not restricted or forbidden by law to own a firearm and buyer states that he/she:

- **Has NEVER been convicted in any court of a crime punishable by imprisonment for a term exceeding 1 year.**
- **Is NOT a fugitive from justice.**
- **Is NOT an unlawful user of or addicted to any controlled substance.**
- **Has NEVER been adjudicated as a mental defective or has never been committed to a mental institution.**
- **Is NOT an alien illegally or unlawfully in the United States or an alien admitted to the United States under a nonimmigrant visa.**
- **Has NOT been discharged from the Armed Forces under dishonorable conditions.**
- **Having been a citizen of the United States, has NEVER denounced his or her citizenship.**
- **Is NOT subject to a court order that restrains the person from harassing, stalking, or threatening anyone..**
- **Has NOT been convicted of a misdemeanor crime of domestic violence.**
- **CAN lawfully receive, possess, and transport a firearm.**
- **Is NOT a person who is under indictment or information for a crime punishable by im-**

prisonment for a term exceeding 1 year.

I truthfully state that I AM NOT a person who cannot legally buy, receive, and posse's firearms and/or ammunition.
I understand that the seller has been convicted of a felony and cannot possess any firearms.

Firearm(s) sold

ALL FIREARMS AND PROPERTY AS INDICATED ON FBI FORMS FD-597

Seller certifies that:

- None of the weapons are prohibited or illegally altered.
- None have been reported lost, stolen or used in any crime.
- He is legally entitled to sell and/or transfer title of his firearms.
- He has been convicted of a felony and cannot own or possess any firearm.
- Transfers sole ownership and possession of property to buyer.

Buyer:
(NAME) Robert L. Rosier
ADDRESS): * * *
(DL#) * * *

(Contact #) * * *

Seller:
(NAME) **Tony Henderson**
(ADDRESS): * * *
(DL#) * * *
(Contact #) * * *

Buyer: Robert L. Rosier
Signature: /s/
Date: 02/04/09

Seller: Tony Henderson
Signature: /s/
Date: 02/04/09

* * *

December 28, 2009

Special Agent Janet Pellicciotti
6061 Gate Parkway
Jacksonville, FL 32256

Ref:	Asset ID Number:	A06-FBI-00141
	Asset Description:	Miscellaneous firearms
	Abandonment Number:	333010A002

Dear Agent Pellicciotti:

My name is Robert L. Rosier. This letter is to notify you that as of December 28, 2009, I hereby make a claim for the above property. I am claiming the property as "received from" Tony Henderson and turned over to the FBI on or about June 9, 2006. I have a right to submit a written claim for the property and do so by this writing and attached form.

On 2/4/09 Tony Henderson contacted me about selling and transferring ownership and possession of some firearms that he had voluntarily turned over to the FBI on 06/09/06. Mr. Henderson stated that he needed to sell the firearms in order to help with the dept that his family had incurred since his arrest and conviction. I agreed to buy the firearms in order to help him and his family with their financial situation.

Mr. Henderson provided me with a receipt and a

list of the firearms and property. I am enclosing a copy of the receipt, claim form and a list of the property. I am a good friend of Mr. Henderson, and a person who has no involvement with his criminal case and no statutory bar from possessing the property.

I met Tony Henderson in March 2004. He and his wife Linda joined our camping club and we have since become good friends. I have always known Mr. Henderson to be an honest and trustworthy man. I have never had any reason not to trust his character both professionally or personal.

I understand that in the event that my claim is granted and the property is released to me the that Tony Henderson will relinquish all interest he has in the firearms and property. In the event that my claim is denied for any reason, I understand that Tony Henderson will retain ownership and interest in the property and has the right to transfer ownership to a person of his choosing.

Please contact me as to how to proceed to a mutually agreeable resolution. I can be contacted at the below address or phone * * *

/s/
Robert L. Rosier

* * *

FEDERAL BUREAU OF INVESTIGATION
CLAIM OF OWNERSHIP OF FIREARMS
Asset ID: A06-FBI-00141

I Robert L. Rosier hereby make a claim for the property associated with the above asset ID number. On 06/09/06, the Federal Bureau of Investigation seized Miscellaneous firearms (See Attached List) from Tony Henderson * * * On 02/04/09 Tony Henderson contacted me about selling and transferring ownership and possession of the above said property. I have purchased the firearms and property as listed on the attached property forms and have enclosed a "Bill of Sale" This form is to is to serve as notice to the FBI as to my right to claim the property as described on attached list. I understand that the (C.F.R.) requires that FBI inform me that I have the opportunity to claim the firearms (41 C.F.R. 128-48.102-1). I understand that if I do not claim the firearms within 30 days of signing this document, the title to the firearms will vest in the United States Government.

I unconditionally release and hold harmless the FBI, its officers, employees and Agents, from any and all claims, demands, damages, causes of actions or suits, of whatever kind and description, and wheresoever situated, that might now exist or hereafter exist by reason of or growing out of or affecting, directly or indirectly, the seizure or waive of ownership interest in the described firearms.

Name: Robert L. Rosier

Address: * * *

Telephone: * * *

Date of Birth: * * *

SSN: _____

Signature: /s/
ROBERT L. ROSIER

Date: 12-30-09

Witness: William M. Bowles

Signature: /s/
WILLIAM M. BOWLES

Title: VP W.W.Gag

Date: 12/30/09

U. S. Department of Justice

Federal Bureau of Investigation

In Reply, Please Refer to
File No.

May 21, 2010

CERTIFIED RETURN RECEIPT

Mr. Tony Henderson
* * *

RE: MISCELLANEOUS FIREARMS
SEE ATTACHED LIST

SEIZURE NUMBER: 3330-10-A-0002
ASSET ID NUMBER: A06-FBI-00141

Dear Mr. Henderson:

Reference the claim for the return of the above referenced property that you filed on January 4, 2010. Your claim has been reviewed and is hereby denied.

A claim for property being abandoned shall not be granted unless the claimant establishes a valid, good faith interest in the property. Title 41, Code

of Federal Regulations (C.F.R.), Section 128-48.503(b) The claim must be sworn, must state the interest of the claimant in the property as owner, mortgagee, or otherwise, must be supported by satisfactory documentary evidence, and must include the facts and circumstances justifying the granting of the claim. 41 C.F.R. § 128-48.503(a)

You have failed to satisfy the regulatory requirements. Assuming *arguendo* that you are the owner of the firearms, our investigation into the merits of your claim confirms your status as a convicted felon. Any firearm possession, actual or constructive, by a convicted felon is prohibited by law. See Title 18, United States Code (U.S.C.), Sections 922(g) and 3665. Therefore, the release of the firearms to you or your designee, Robert Rosier, as you have requested, would place you in violation of federal law, as it would amount to constructive possession. See United States v. Howell, 425 F.3d 971, (11th Cir. 2005); United States v Felici, 208 F.3d 667, 670 (8th Cir. 2000), *cert. denied* 516 U.S. 897 (1995), *citing* United States v. Sample, 136 F.3d 562 (8th Cir. 1998). Moreover, as you do not have the authority to legally possess firearms, you cannot delegate the authority to any other person. See Howell, 136 F.3d at 977. Consequently, your claim for the release of the subject firearms to Robert Rosier must be denied, as you have failed to establish a valid good faith interest in the property as required by 41 C.F.R. § 128-48.503.

You may request that the Federal Bureau of Investigation reconsider the denial of your claim. A request for reconsideration must be based on evidence recently developed or not previously considered and must be submitted within ten days of the receipt of this letter denying your claim. See 41 C.F.R. § 128-48.502(e). The request must be addressed to the Director, Federal Bureau of Investigation, Finance Division, Forfeiture and Seized Property Unit, Suite 510, 935 Pennsylvania Avenue, N W Washington, D.C. 20535, Attention: Lisa Curry

Sincerely,

/s/

Lisa Curry

Property Management Officer

* * *

* * *

June 3, 2010

Director
Federal Bureau of Investigation
Finance Division
Forfeiture & Seized Property Unit
Suite 510
935 Pennsylvania Avenue, N.W.
Washington, DC 20534
Attn: Lisa Curry

Seizure Number 3330-10-A-0002
Asset ID Number A06-FBI-00141

Dear Ms. Curry

My claim for return of the above property has been denied. I request that this issue be reconsidered. The above property has been deemed abandoned by the FBI, however, this property was never seized under any authority of law and I have never been provided notice of seizure. The property was voluntarily turned over to the FBI at their request when I was arrested. They requested that the property be turned over for safekeeping and I cooperated. I was never advised that doing so would render this property subject to seizure or abandonment. The firearms were never purchased with proceeds of any crime or part of any crime in any way. I cooperated as a law enforcement officer and fully expected by property rights to be respected. I voluntarily turned over the items at the request of the FBI as I assumed

they were concerned about the safe keeping of the weapons until the conclusion of the criminal case. Please see the letter from me dated December 28, 2009.

My wife and children have and continue to have a financial and vested interest in this property. In order to resolve this matter, my family attempted to transfer the title to the weapons to an interested party who would then give compensation to my wife and my children. The FBI now states that I cannot transfer title because I am a convicted felon. However, if I had not voluntarily cooperated and temporarily transferred possession for safekeeping to the FBI, I could have long ago transferred title and possession.

Please reconsider the abandonment of this property and return the property or title to the property to my wife and children and allow them the opportunity to transfer title to any person legally permitted to possess them. My wife and children have never abandoned their claim to the property. It is unfair dealing to ask me to turn over property that I am legally entitled to possess when there is no legal basis for seizure until such time as the FBI determines that my rights have been extinguished and then refuse to allow my family or another lawful owner to now exercise their rights.

Please advise me under what theory my property was taken from my possession and the regulations that deny my heirs their legal interest in my jointly owned property. I ask that the abandonment be

reconsidered and relief granted to my wife and children.

Respectfully submitted

/s/
Tony Henderson
* * *

Objections to Magistrate Judge's Report and Recommendation
D.C. Dkt. No. 170

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES,

v. **CASE NO. 03:06-CR-211-J-32TEM**

TONY HENDERSON,
_____/

OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATION RELATED TO MOTION FOR RETURN/DISPOSITION OF PROPERTY

The above Petitioner, Tony Henderson, appearing *pro se*, files Objections in accordance with 28 U.S.C. § 636, Rule 59, Federal Rules of Criminal Procedure and Rule 6.02, Local Rules, U.S. District Court, Middle District of Florida, to the Magistrate's Report and Recommendation filed May 27, 2011.

Petitioner had filed a Motion for the Return/Disposition of Property seeking restoration of the non-possessory interest in property pursuant to U.S. v. Edward L. Brown and Elaine A. Brown, 754 F.Supp.2d 311 (D.N.H. 2010). The Magistrate held a hearing and accepted exhibits and testimony at a

hearing on May 16, 2011. The facts as outlined at paragraphs 1 through 16 are incorporated by reference herein.

The Magistrate and government relied on the Eleventh Circuit authority in U.S. v. Howell, 425 F.3d 971 (11th Cir. 2005). However, that analysis is not factually similar to this case. Howell's firearms were "seized" during a consent search of his residence. Subsequently, Howell sought return of the "seized" property. Howell, was apparently on notice that the property was seized and had to the potential to be forfeited based on that seizure.

In this case it is undisputed that the government did not "seize" the firearms at issue. See Magistrate footnote 6 at page 7 of the decision. Petitioner, Henderson, voluntarily surrendered the firearms at the request of the court. A property receipt for possession of the firearms was provided to the Petitioner. At no time did the government provide the Petitioner with notice of any kind, prior to his conviction, that his rights to transfer or dispose of his property could be affected by any plea agreement. Yet the government now alleges that the firearms could have been transferred, sold or otherwise disposed of by Petitioner prior to his plea agreement and conviction. The Petitioner would have had to be clairvoyant to know that he had any such option during the pendency of the criminal matter while his property was held for safekeeping. Petitioner believed the property was surrendered in order to prevent any attempts at suicide rather than the government attempting to divest him of property interests that it could not le-

gally seize. The Petitioner's bond was secured by financial interests which obligation was released upon his continued appearance in court. Petitioner had no way to know, and was never put on notice, that his failure to exercise his interest in the property by sale or transfer of interest to another would result in extinguishing his rights altogether. Sale or transfer of interest in property that has collectible or other subjective value, based on the condition and accessibility to the property, was impossible under the circumstances. If sale or transfer of property being held under a term of a bond was an option, the Petitioner was certainly not on notice of the jeopardy his property interest faced when complying with a request of a court. Generally, one cannot pass good title to property that is securing a bond or the bond would be meaningless.

The government seeks to also divest petitioner's spouse of her interest in property, purchased with marital assets during the course of their 21 year marriage, without notice to her, is also contrary to concepts of equity and notice. No notice was ever sent, or published, seeking to find out who, if anyone else, had an interest in the property. At Petitioner's first request for the return of property, he sought to transfer the property to his spouse. Petitioner later sought to sell the property so that the government could not argue that transfer of the interest in the property to a spouse was illusory and actually constructive possession by Petitioner, who was now a convicted felon. There is no argument that Petitioner cannot legally possess the firearms at issue. However, Petitioner's wife is not barred from her own finan-

cial interest in the property, whether by possession or by financial interest.

The facts in U.S. v. Brown, in Re: Claim of Bernhard Bastian, Jr., 754 F Supp.2d 311 (D.N.H. 2010), see also U.S. v. 627 Firearms, 589 F. Supp. 2d 1129, 1140 (S.D. Iowa 2008), are virtually identical to the facts in this case. In Brown, the court rejected "the proposition that firearms lawfully owned must, following the owner's unrelated felony conviction, sit wherever they may be, unalienable and wasting, not subject to forfeiture, not subject to confiscation as contraband, and not subject to disposition by the owner, or by anyone else, or by the court for the owner's benefit." The court further rejected "that such property is subject to government confiscation and destruction in the absence of due process or payment of just compensation." The remedy fashioned by the Brown court, the judge exercised equitable powers and ordered the transfer of title to firearms lawfully owned, but later convicted of a felony (which were not subject to forfeiture or confiscation as contraband) for the felon-owner's benefit as outlined in 627 Firearms. Brown is a 2010 decision recognizing the owner's rights to an interest in property that was not seized and not contraband.

Petitioner recognizes there is a split in the circuits as to the court's ability grant equitable relief. However, in this case, the facts are not similar to Howell, but are rather comparable to the later decided case of Brown. Howell argues that the defendant comes with "unclean hands," while in this case the government is also arguable flawed for failing to give notice

of its attempts to seize property used to secure a bond. While the marital property rights of the petitioner's spouse are not discussed in either case, when the property is not contraband, or used in any criminal activity and surrendered seemingly to protect against any potential for suicide of an individual facing criminal charges, the rights of the spouse must be given consideration.

The government relies on § 922(g) as the reason that Petitioner cannot constructively possess or exercise dominion and control of his firearms collection in spite of the fact that there is no basis for seizure and clearly no abandonment. There is no case law that holds that mere continuing ownership of firearms following a felony conviction, without more, amounts to constructive possession of firearms. Yet when the Petitioner attempts to divest himself of that ownership, whether through allowing title to pass to his spouse to transfer of title to another under terms of a sale that will be determined upon fair evaluation of the condition and subjective value to the buyer of the firearms, the government claims the divesting of that ownership amounts to a violation of § 922(g). This stretches the concept of "constructive possession," as the term is used in the criminal statute prohibiting possession by felons much too far, essentially equating criminal constructive possession with even the most minimal exercise of an indicia of ownership transferring legal title (and, ironically, thereby divesting title to personal property that the owner may not lawfully possess). No precedent cited by the government holds that mere continuing ownership of firearms follow-

ing a felony conviction, without more, amounts to constructive possession. Prosecution of a person not in possession of firearms but only seeking to divest ownership of firearms has never been tested.

Relief pursuant to 41(g) is meant to provide equitable relief. Many courts have fashioned solutions that preclude convicted felons from unilaterally dictating or directing disposition of their lawfully owned firearms while avoiding the serious constitutional issues under the *Takings Clause* while protecting the felon-owner's legitimate property interests. This case begs the question of whether equity dictates that Petitioner's spouse be denied her interest in the property of the Petitioner is denied the value of the property which was never seized, abandoned or considered contraband but was merely voluntarily surrendered temporarily during the pendency of bond conditions. If the Court wishes to impose such terms of bond in the future, equity dictates that the government must provide notice that the Defendant/Petitioner has the option of transferring title prior to any final resolution of a criminal matter. The burden on the government to provide such notice at the time bond conditions are set are minimal at best, compared to the potential loss without cause to the person facing criminal prosecution. When asked "would a reasonable person in such circumstances be on notice," the answer must be "No." The Court had an opportunity to provide such notice at the time terms of a bond are set and the government had such opportunity as well. Regulatory guidelines under CAFRA were not followed either which would have put the Petitioner on notice.

Under the circumstances, the government should be barred by the doctrine of *laches* from now asserting it gave adequate notice. The firearms were voluntarily surrendered in June 2006 but the first notice that the FBI considered the firearms were "seized" was by letter dated December 16, 2009, after numerous attempts by the Petitioner to determine how to transfer the firearms to his spouse or a designated purchaser, two and one-half (2 ½) years later. The FBI did not provide a final decision regarding his request until January 26, 2011, five and one-half (5 ½) years later. This fails all tests of reasonableness or any statute of limitations, such a CAFRA notice. The lack of notice is a violation of due process which has now prejudiced the Petitioner.

Because these facts are in fact more similar to those in Brown rather than Howell, Petitioner requests this District Court to review the Magistrate's Report and Recommendation and grant the request that Petitioner's spouse, Linda Henderson, be given possession and control of the firearms collection to dispose of in any legal manner she chooses, or that this court order that a person lawfully entitled to own the subject firearms collection be awarded possession and control and direct that payment for the firearms be awarded to Petitioner and/or Linda Henderson after fair value can be determined.

Dated: June 06, 2011

Respectfully submitted,

/s/

Tony Henderson, Pro Se

* * *

Transcript of May 16, 2011 Hearing
D.C. Dkt. No. 182

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA,	**Jacksonville, Florida**
Plaintiff,	**Case No. 3:06-cr-211 (S2)-J-32TEM**
vs.	**May 16, 2011**
TONY HENDERSON, a/k/a "Hollywood",	**2:07 p.m.**
Defendant.	**Courtroom No. 5B**

DIGITALLY RECORDED
EVIDENTIARY HEARING BEFORE
THE HONORABLE THOMAS E. MORRIS
UNITED STATES MAGISTRATE JUDGE

GOVERNMENT COUNSEL:

RUSSELL C. STODDARD, ESQ.
United States Attorney's Office
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Jacksonville, Florida 32202

DEFENSE COUNSEL:

TONY HENDERSON, PRO SE

* * *

TABLE OF CONTENTS

Page No.

WITNESS FOR THE DEFENDANT:

TONY HENDERSON

Direct Examination..... 5

Cross-Examination.....25

EXHIBITS RECEIVED

Page No.

Defendant's Exhibits:

No. 1 through 15.....28

[3]

PROCEEDINGS

May 16, 2011 2:07 p.m.

- - -

COURT SECURITY OFFICER: Please be seated.

THE COURT: All right. Good afternoon. We're here on case 3:06-cr-211-J-32TEM. Actually, it's -- I think it was (S2) at one point -- 211 (S2)-J-32TEM, *United States versus Tony Henderson*.

Mr. Henderson has filed a petition - - or a motion for return of disposition of property, which was document 155. And then, more recently, a renewed motion, which is document 165, which contains a little more factual information.

And the United States did file a memorandum in opposition to the return of the property.

For the United States, we have Mr. Russell Stoddard, Assistant U. S. Attorney, and Janet Pellicciotti, of the FBI, present.

And this was set for an evidentiary hearing and argument as to the property.

Mr. Stoddard, is it still the United States' position that the property cannot or should not be returned or disposed of in any way that Mr. Henderson

seeks?

MR. STODDARD: That is correct, Your Honor. And that is the position that we outlined in our response. I believe it's document No. 159 on the docket.

[4]

THE COURT: Yes.

Mr. Henderson, you're representing yourself in this matter?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. It's sort of -- it's an interesting issue. I've, of course, done legal research. The parties have each cited cases.

And there are some district courts or circuits in the country which have allowed disposition of firearms to the -- at the direction, I guess, or to the benefit of the person who is -- they've been seized from or surrendered.

I would need to develop a little evidence in this case. I've, of course, got the pleadings, but I've never seen the notice of seizure that the FBI apparently sent you at some point.

Do you have a copy of that?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: All right. Do you want to -- how do you want to proceed, Mr. Henderson? Do you want to -- I need to get this under oath, I guess. You're going to need to testify probably.

Are you willing to do that?

THE DEFENDANT: Whatever you say, Your Honor.

THE COURT: All right. Let's place Mr. Henderson under oath.

[5]

COURTROOM DEPUTY: Do you solemnly swear the statements you're about to give before this court will be the truth, the whole truth, and nothing but the truth, so help you God?

THE DEFENDANT: Yes, I do.

COURTROOM DEPUTY: Thank you.

TONY HENDERSON,

Having been produced and first duly sworn as a witness, testified as follows:

DIRECT EXAMINATION

THE COURT: And, for the record, the United States is relying on the *Howell* case, I believe, for the Eleventh Circuit? At least that's one of the primary

authorities?

MR. STODDARD: That is -- that is correct.

THE COURT: And, of course, that refers under Rule 41(g) for seized property, pursuant to a search warrant, I guess.

This was never seized pursuant to a search warrant, so we'll see what the notice of seizure says. Because I'm not clear what -- we're really under 41(g) or not, but.

Mr. Henderson, do you want to take the stand, I guess, and take your documents up there?

Do you have copies of them for the court?

THE DEFENDANT: Yes. Yes, I do, Your Honor.

THE COURT: Okay.

[6]

(Judge confers with the courtroom deputy.)

THE COURT: Yes. If you have them -- anything you intend to introduce today, if you could give that to my courtroom deputy, or the CSO.

THE DEFENDANT: Oh, okay. I have the -- I have the exhibits. I can give you all the exhibits or I can just wait to see what y'all don't have -- what you

don't have. Or however you want to do it.

THE COURT: All right. Why don't you just take them up there with you to the stand, and we'll -- we'll go by one by one and have them identified what we're referring to.

And, for the record, Mr. Rosier is not present today?

THE DEFENDANT: No, he is not, Your Honor.

THE COURT: Okay. All right. Let's see what we can stipulate to, to begin with. I think it's uncontradicted that when you were released on bond by Judge Richardson he ordered you to surrender the firearms -- I believe to some federal agency, either DEA or some other federal agency.

You chose to surrender them to the FBI; is that correct?

THE DEFENDANT: That's correct, Your Honor.

THE COURT: And that was done on June 6th -- pardon me, June 9th of 2006?

THE DEFENDANT: That's correct, Your Honor.

[7]

THE COURT: And then your case proceeded --

it's my understanding you pled guilty to a count in the second superseding indictment on -- it may have been early December of 2007?

THE DEFENDANT: September 20th, 2007, I believe, Your Honor.

THE COURT: September 20th, 2007? And there was an order, document 120 -- well, the plea agreement was 128 in the case, I believe. And that was filed on November 30th of 2007.

THE DEFENDANT: The plea agreement?

THE COURT: Yes, according to the docket sheet.

THE DEFENDANT: Yes.

THE COURT: And it appears the change of plea proceeding was on November 30th of 2007.

THE DEFENDANT: That's correct, Your Honor.

THE COURT: Okay. And then you were adjudicated guilty by Judge Corrigan on December 6th of 2007. Is that correct?

THE DEFENDANT: I was sentenced on April 21st.

THE COURT: Right. But there was a separate order, document No. 129, that's called ac-

ceptance of plea and adjudication of guilt as to Count Five of the second superseding indictment.

THE DEFENDANT: That's correct, your Honor.

THE COURT: And then you were sentenced on April

[8]

24th of 2008. And I believe you received a six-month sentence followed by a supervised release?

THE DEFENDANT: 24 months supervised release, including four months on home detention.

THE COURT: Okay. Do you recall when you were released from prison or incarceration?

THE DEFENDANT: It was December.

THE COURT: Of 2008?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And, Mr. Stoddard, if you disagree with any of this, just speak up. I'm just trying to cut to the important parts at some point.

Now, you indicated in your renewed motion for disposition of property that you contacted the FBI -- this is in document 165 -- in November of 2008. So that would have been while you were still in prison, or on home detention?

THE DEFENDANT: That was an error, Your Honor. That was supposed to be December.

THE COURT: It should be December?

THE DEFENDANT: Yes, Your Honor.

THE COURT: So December of 2008, after you were released from --

THE DEFENDANT: Yes, Your Honor.

THE COURT: -- incarceration, you contacted the FBI?

THE DEFENDANT: That is correct.

[9]

THE COURT: And was that local? Or do you know who you talked to?

THE DEFENDANT: It was the agent on duty.

THE COURT: Here in Jacksonville?

THE DEFENDANT: That's correct, Your Honor.

THE COURT: And he told you to file the copy of the bill of sale, along with a letter?

THE DEFENDANT: Yes. Can I say something?

THE COURT: Yes.

THE DEFENDANT: Prior to that, on June 13th of 2008, while I was still incarcerated, Mr. Rosenblum wrote a letter to the U.S. Attorney's Office -- U.S. Attorney Stoddard inquiring about the firearms.

Mr. Rosenblum asked for which steps that would be needed to be taken to transfer the firearms. And I have a copy of that letter. And we never received any correspondence back.

THE COURT: All right. Do you want to have that letter marked as Exhibit No. -- Defense Exhibit No. 1?

THE DEFENDANT: Yes.

THE COURT: Okay. And then afterward you say you never received any further correspondence back. I'll let you find that first.

(Judge confers with the courtroom deputy.)

THE COURT: We need to give one to Mr. Stoddard too,

[10]

yes.

Defense Exhibit No. 1. Yeah. All right.

This doesn't have the attached list, but that's --

I think you've had that attached to something else earlier.

THE DEFENDANT: Yes, Your Honor.

THE COURT: And I don't think the list is in dispute, so -- all right. What happened after that, then? What's the next thing that occurred with relation to the firearms?

THE DEFENDANT: Okay. Do you want me to start at the beginning? Or do you --

THE COURT: Well, yeah, whatever you're most comfortable with. I was just trying to --

THE DEFENDANT: Okay.

THE COURT: Go ahead.

THE DEFENDANT: I filed the motion for the disposition of property on February the 2nd, 2011. That motion seeks the restoration of the non-possessory interest in the property pursuant to the *U. S. versus Edward L. Brown and Elaine A. Brown* case, April 9, 2010.

I'd like to -- Your Honor, I'd like to lay out -- first I'd like to lay out, like, a timeline --

THE COURT: Yes.

THE DEFENDANT: -- if that would be possible. And then --

[11]

THE COURT: Certainly.

THE DEFENDANT: -- go into the points.

THE COURT: Okay.

THE DEFENDANT: On June 7th I was arrested as a result of a warrant and criminal complaint issued in the Middle District of Florida, charging me with knowingly and willfully and intentionally for the distribution of marijuana, Scheduled I, controlled substance, the amount of marijuana being less than 50 kilograms, in violation of Title 21, U.S.C. -- Code, 841(a)(1) and 841(b)(1)(D).

THE COURT: Now, the indictments and things of that nature are already in the court files, so I don't need copies of those.

THE DEFENDANT: Okay, Your Honor. On June 7th, I appeared before Judge Monte Richardson, where bond conditions were set.

One of the conditions was the bond -- as indicated on page two, paragraph four, was defendant was required to immediately surrender all firearms, all law enforcement firearms, and credentials to the DEA or any other authorized federal agency.

In addition to all firearms, I voluntarily surrendered 19 personal firearms to the FBI for safe-

keeping as a condition of the bond while the charges were pending against me, and, also, the fact that the judge had a concern over my

[12]

mental health and safety, for my concern over my family and myself. At that time the judge felt that I was a suicide risk.

On June 9th, FBI agents Janet Pellicciotti and Douglas Mathews met with me and my attorney, Alex Christine, at my residence * * * I voluntarily turned over all the firearms noted on form FD-597 and FD-302.

Do you have a copy of that, Your Honor, or...

THE COURT: The form where you surrendered the firearms?

THE DEFENDANT: Yes. Or do you want me ---

THE COURT: I don't believe I do.

THE DEFENDANT: I'd like to note on -- after the cover sheet on page one, on the right-hand corner, the items listed below were received from me and turned over to the FBI.

On September 20th, I was indicted on a superseding indictment. November 30th, pursuant to written plea agreement, I entered a plea of guilty to

Count Five of the second superseding indictment. Count Five charged me with distribution of marijuana, violation 21, U.S.C. -- Code, Section 841(a)(1) and 841(b)(1)(D).

I'd like to make a -- several points about the plea agreement.

THE COURT: Yes.

[13]

THE DEFENDANT: On the -- on the terms I entered a plea of guilty to Count Five of the superseding indictment charging me with distribution of marijuana, a Schedule I substance, the amount of marijuana being less than 50 kilograms, in violation of 21, U.S.C., 841(a)(1) and 841(b)(1)(D).

The maximum penalty possible, up to five years imprisonment, $250,000, or both -- imprisonment. A supervised release of two years. A special assessment of $100.

As far as the elements of the offense, I understood the nature and the elements of the offense which I had been charged with pleading guilty to.

Counts dismissed at the time of sentencing, the -- Counts One, Two, Three, Four, Six, Seven, Eight, Nine, Ten, and Eleven were dismissed.

Item five, no further charges. The United States Attorney's Office agrees no other charges of

defendant committing any other federal criminal offense known in the United States Attorney's Office at this time in the execution of this agreement related to conducting [sic] giving rise to this plea agreement.

No. 7, forfeiture, the United States agrees not to pursue and will dismiss any motions related to the forfeiture identified in the superseding indictment, to include the lot and partial land, together with buildings, located at my

[14]

residence which are titled in my wife's name and I -- mine.

On April 9th, 2008, the U.S. Attorney's Office filed a motion to dismiss the real property forfeiture allegation of the second superseding indictment.

THE COURT: And the only specific property listed in that forfeiture provision was the house, to begin with, and the property?

THE DEFENDANT: That's correct, Your Honor.

THE COURT: Okay.

THE DEFENDANT: April 21st, I was given a sentence of six months' imprisonment, which I followed -- served, followed by a period of supervised release, 24 months, including four months of home detention.

On June 11th, the time of supervised release was shortened and terminated.

And this is, I guess, where we get into the -- where I started inquiring. On June 13, 2008, my attorney, Rosenblum, wrote a letter to AUSA -- U.S. Attorney Stoddard and -- where he addressed that.

On December of 2008, shortly after release from the Bureau of Prisons, I contacted the FBI via telephone, inquired about the procedures that I would have to take in order to transfer possession and ownership of the property that was received from me on June 9th, 2006.

I was told to submit a written letter explaining the

[15]

details, along with -- of the case, along with a bill of sale and the contact information of the person to whom I wished the property to go to.

On December 17th, I sent a letter to the agent in charge of the FBI office in Jacksonville explaining the facts of the case, and indicated on 12/1 that I had transferred possession/ownership of the firearms to William Boggs, and gave the contact information of both parties.

William Boggs was a -- or is my next-door neighbor. I spoke with him about transferring ownership and purchasing the weapons. And he agreed

on -- initially he agreed to do so.

THE COURT: How do you spell his last name?

THE DEFENDANT: B-o-g-g-s. I have a copy of that letter. And, also, I have a copy of the bill of sale.

THE COURT: All right. Now, that's a different letter or bill of sale than listed in your renewed motion as to Mr. Robert Rosier, right?

THE DEFENDANT: That is correct, Your Honor.

THE COURT: Okay. Well, let's go ahead and get that in the record too, then.

THE DEFENDANT: Shortly after I submitted the letter to the agent in charge of the FBI field office, they contacted Mr. Boggs on or about January 24th, 2009, concerning taking possession of the firearms.

[16]

Two days later, Mr. Boggs informed me that after speaking with the FBI he didn't feel like he wanted to take possession of the firearms, that he didn't want to purchase them or become involved, so, therefore, the -- the bill of sale was voided.

March 2nd, I sent a letter to the agent in charge of the FBI field office in Jacksonville, Florida.

I explained due to the fact that Mr. Boggs no longer wanted to take possession of the firearms that I spoke with an acquaintance and a friend, Mr. Robert Rosier, about taking possession of the firearms. And I have that letter that I sent, and also a bill of sale.

THE COURT: All right.

THE DEFENDANT: April 6, I contact -- I sent a letter to the agent in charge of the FBI field office and asked the OIC, or the case agent, to please contact my wife or Mr. Rosier and indicate when the property may be transferred.

On December 14th, 2009, I sent a letter -- another letter to the OIC, field office, in Jacksonville, Florida, indicated that I'd made several good-faith attempts to contact the FBI and tried to transfer possession/ownership of the firearms that were voluntarily turned over by myself on June 9, 2006.

I also called several times -- April 22nd, 2009, at 1 p.m., I called the FBI and spoke with them -- and I didn't

[17]

get the agent's name. The agent would not give his name -- or their name -- trying to get information about if they could contact reference to firearms.

April 30th, again, at 11 o'clock a.m., the agent would not give the name. May 13th, 2009, at 11 a.m., the agent wouldn't give the name. June 22nd, 2009,

at 2:30 p.m., I spoke with an Agent Rusty, who said he -- they would get someone to call me back.

December 14th, 2009, 11 a.m., I spoke with Agent Eubanks, who informed me that they were aware of my request and they would be contacting me.

I asked Agent Eubanks, How come -- how come it only took three weeks for them to approve Mr. Boggs to take possession of the firearms, but they were not allowing me to turn them over to Mr. Rosier? He said he didn't know. But they were trying to work out -- work with the U.S. Attorney's Office regarding the situation.

I requested to speak with a supervisor and was denied to speak with anyone else. I have a copy of that letter that was submitted on December 14th.

THE COURT: Let me ask you one question right there. You said you were under the impression that you had been approved to turn the firearm -- or that Mr. Boggs had been approved to receive the firearms from the FBI?

THE DEFENDANT: That's what he told me. But then he

[18]

called them back and said that he didn't want to.

THE COURT: Did the FBI tell you that, or

just Mr. -- did Mr. Boggs?

THE DEFENDANT: Mr. Boggs. Mr. Boggs. The FBI wouldn't give me no information, Your Honor.

THE COURT: All right. And you'd never received anything in writing indicating they had approved it for Mr. Boggs?

THE DEFENDANT: No. No, Your Honor.

THE COURT: Okay.

THE DEFENDANT: June 5th of -- excuse me, Your Honor.

January 5th, I received a letter from the FBI indicating that an investigation was being conducted to the merits of the claim. That was the first correspondence -- written correspondence that I had ever received from them.

THE COURT: That's 2010?

THE DEFENDANT: Yes. Let's see. Yes, Your Honor.

THE COURT: Okay.

THE DEFENDANT: Yes.

THE COURT: Do you have a copy of that letter?

THE DEFENDANT: Did...

THE COURT: Or was it attached to one of your pleadings earlier?

THE DEFENDANT: I think -- I think we did it -- was

[19]

it actually only on that, that last one?

THE COURT: No.

THE DEFENDANT: On December 16th, 2009, I received a letter from the FBI indicating that on June 9th, 2006, the FBI had seized the firearms and I had 30 days in order to submit a claim for the property. Instructions were given on how to submit the claim for the property.

On December 28th, myself and Mr. -- Mr. Rosier and myself submitted written claims indicating -- and including a statement of facts and circumstances justifying the claim for the property.

The claims was supported by documentary evidence establishing valid good-faith interest in the property, attached a bill of sale, along with a settlement agreement that I offered the FBI.

This is a copy of my submission. And I also have a copy of Mr. Rosier's submission.

January the 5th, 2010, I received a letter from the FBI indicating that an investigation was being conducted into the merits of my claim. And May 21st, 2010, Mr. Rosier and myself received a letter indicating that the claim had been denied; again, a copy of the denial received by myself and by Mr. Rosier.

June 3rd, 2010, I requested a reconsideration on the decision.

[20]

THE COURT: Mr. Henderson, these -- this Exhibit No. 11, the letter dated -- the certified letter to you from the FBI, dated May 21st -- one looks like a mailed copy and one a faxed copy of the same thing.

Go ahead and hand that back and let him look at those. We would just need to...

COURTROOM DEPUTY: Am I marking this as one exhibit, or two?

THE COURT: Well, we probably don't need both of them if they are the same, indeed. We'll take the letter instead.

MR. STODDARD: Actually, Your Honor, I believe --

THE DEFENDANT: One is to Mr. Rosier and one is to myself.

MR. STODDARD: -- one of -- one of them is addressed to Mr. Rosier.

THE COURT: Oh, okay. All right.

MR. STODDARD: And the other one is addressed to Mr. Henderson.

THE COURT: We can mark them as 11A and B, if you want to, if that's easier.

(Judge confers with courtroom deputy.)

THE COURT: All right. We'll make it 11 and 12, then. Okay.

THE DEFENDANT: June 3rd, I requested a

[21]

reconsideration -- requested a reconsideration on the decision. And, on January 26th, I received a letter from the FBI indicating that the reconsideration was denied.

I feel that the FBI's response to my administrative request for return of my property to a person entitled to legally possess firearms under state and federal law -- the response of the denial was based on my abandonment of the property, citing 41, C.F.R., 128-48.502.

The agency has failed to follow its own proce-

dures relating to notifying me that the property was seized under 41 C.F.R. 128-48.102-1(b).

According to the FBI's seizure letter -- seizure letter, dated December 16th, 2009, I was advised that the property was seized on June 9th, 2006.

The notice of the seizure was received three years, six months and seven days after the property was received from me.

My question is: What would be the legal basis for the seizure? And how could the property be seized prior to my plea agreement on November 30th and my sentencing on April 21st, 2008? And there would be no probable cause for seizure.

On January 21st, 2011, Agent Stoddard received -- or, excuse me, U.S. Attorney Stoddard -- Mr. Stoddard received a letter from the FBI indicating that on December 2009 the FBI initiated an abandonment process to resolve the disposition of

[22]

the number of weapons that were seized pursuant to my arrest on -- 2006.

Again, there was -- there would be no probable cause for -- for a seizure at that time. I was merely under indictment. I have a copy of that letter.

THE COURT: Yes, please.

THE DEFENDANT: I'd like to make the following points in the case, Your Honor.

THE COURT: All right.

THE DEFENDANT: The firearms have been owned by my family and me for many years. Many were given to me by inheritance, trading and buying from family members, friends, co-workers and other law enforcement officers.

I was a border patrol agent for 22 years, involved in law enforcement. The firearms were not illegally possessed at the time that I had them in my possession. None of the weapons were prohibited or illegally altered and none of them reported lost and stolen.

My conviction was totally unrelated to the surrender of the firearms. The firearms were voluntarily turned over to the FBI for safekeeping, like I said, and as a condition of the bond. The firearms are no longer held as a condition of the bond.

The firearms were not acquired by any administrative process or any court order. I was never advised that by

[23]

voluntarily turning them over it would render them abandoned or seized.

The firearms were never found to be involved

in any criminal activity, nor were they ever determined to have been purchased from proceeds from any criminal activity, nor were they ever used to facilitate the commission of any crime.

The firearms at issue do not constitute contraband, fruits of a crime, and are not subject to forfeiture or seizure. There is no basis for the seizure of the firearms.

I still hold legal title to the property at issue because a transfer of title cannot be completed by Mr. Rosier. And I acquired title before the government alleged any criminal activity.

The firearms were never seized, forfeited, abandoned, or considered unclaimed personal property, nor were they ever used as evidence in any other criminal case.

There was no probable cause for any seizure, nor there's any belief that the property was ever used unlawfully.

Mr. Rosenblum contacted the U.S. Attorney's Office in -- June 22nd of 2008. I contacted the FBI six times by telephone and wrote three letters prior to receiving the first correspondence from the FBI of a notice of seizure, December 2009.

For this reason, I feel how can they be considered abandoned? I was not given notice within the time frame

[24]

required by law that the firearms were considered seized. No notice or seizure was ever provided -- they never provided any -- citing any statute under which the firearms were seized. There was no forfeiture provision or plea agreement where I agreed to forfeit any assets. The firearms were not involved as part of any search or seizure.

And I'd like to make this perfectly clear, Your Honor. I do understand that by being a convicted felon that I cannot own or possess a firearm. I do understand that.

Since my wife can legally own and is lawfully entitled to the firearms, I respectfully request that my spouse, who is present, Linda Henderson, be given possession of, title, and control of the firearms collection for the benefit of my adult children and heirs.

In the alternative, I respectfully request that the court take jurisdiction over this issue and render a final decision and a request to transfer my non-possessory interests and issue Mr. Robert Rosier ownership, title, and possession, or any other person of my choosing who is lawfully entitled to own subject firearm collection.

And that concludes my...

THE COURT: Mr. Henderson, are you still on supervised release?

THE DEFENDANT: No, I'm not, Your Honor.

THE COURT: And can you identify who Mr. Rosier is?

[25]

Is he a neighbor? Where does he live? What's --

THE DEFENDANT: Mr. Rosier lives in St. Augustine, Florida. I met him in -- can I look at my notes, Your Honor?

THE COURT: Yes.

THE DEFENDANT: I met him on -- about March 4th, through some -- a highway patrol friend of mine in a camping group that I was involved in, a little camping -- my wife and I joined a camping club. And it was acquaintance to them. He lives in St. Augustine, Florida.

THE COURT: And, to your knowledge, he has no felony convictions?

THE DEFENDANT: That is correct, Your Honor. And...

THE COURT: Is he a firearms dealer?

THE DEFENDANT: No, he's not, Your Honor. He's a private citizen, early 70s, grandchildren, family man.

THE COURT: The bill of sale you presented

does not indicate he paid you anything for the firearms.

THE DEFENDANT: That is correct, Your Honor. He was going to get the firearms, look the firearms over, if he felt like he needed to have an appraisal or -- go from there, and then we would decide on what would be transferred, as far as funds.

THE COURT: Mr. Stoddard, do you have any questions?

MR. STODDARD: I do.

CROSS-EXAMINATION

[26]

BY MR. STODDARD:

Q. Mr. Henderson, according to the letter that you sent the FBI on December -- dated December 14th, 2009, the first attempt that you made to transfer possession of these weapons was on December 1st of 2008; is that correct?

A. No. The first attempt was made by Mr. Rosenblum.

Q. I'm asking your first attempt. That was on -- according to your letter, that was on December 1st, 2008?

A. According to my letter, that's correct.

Q. And that would have been to Mr. Boggs?

A. Yes.

Q. And, for whatever reason, Mr. Boggs decided he didn't want the firearms; is that right?

A. That's correct.

Q. And so your next attempt would have been on -- approximately a little over -- a month later, on December -- excuse me, on December 26th -- or, I'm sorry, on February 4th, 2009, was when you contacted Mr. Rosier about your firearms; is that correct?

A. Yes.

Q. So you've made two attempts to transfer ownership of these firearms, once in 2008 and once in 2009; is that correct?

A. Yes.

Q. Now, did you make any attempt to transfer possession of

[27]

these firearms prior to December 6th of 2007?

A. Wasn't that when I was -- turned them over?

Q. I don't believe so.

THE COURT: No. December 6th, 2007, is when you were adjudicated guilty.

BY MR. STODDARD:

Q. That was when you were adjudicated guilty. Did you make any attempt to transfer ownership prior to December 6th, 2007?

A. No.

Q. Did you make any attempt to transfer ownership prior to April 24th, 2008?

A. What was the date?

Q. April 24th, 2008, the day you were sentenced.

A. No, I did not.

Q. So any attempt that you've made to transfer ownership of these firearms has occurred since you have been convicted of a felony; is that correct?

A. That's correct.

Q. I have no more questions.

A. Okay.

THE COURT: All right.
All right. Anything else you wish to testify to,

Mr. Henderson?

I'll have argument. And I may hear if the United

[28]

States has some evidence they wish to present, but...

THE DEFENDANT: Not at this time, Your Honor.

THE COURT: All right. You may step back down to the table. Thank you.

And any objection to -- I think I've got Exhibits 1 through 15 -- Defendant's Exhibits 1 through 15.

Any objection to those?

MR. STODDARD: No objections, Your Honor.

THE COURT: All right. They will be admitted into evidence.

(Defendant's Exhibit Nos. 1 through 15 were received into evidence.)

THE COURT: Mr. Stoddard -- again, you have no other witnesses you wish to call, Mr. Henderson?

THE DEFENDANT: No, I do not, Your Honor.

THE COURT: Okay. Mr. Stoddard, do you

have any evidence you wish to present?

MR. STODDARD: No, Your Honor. We would rely on the previous memorandum that's been submitted by the government.

THE COURT: I would like you to address, first, the point Mr. Henderson raised about the FBI perhaps not following its own procedures under 41 C.F.R., because they did not seize the weapons until or they did not send him a letter of notice of seizure, if that's, indeed, what it was to be called -- and under 128, slash -- C.F.R. -- 41 C.F.R., Section

[29]

128-48.1, and that -- which concerns abandoned property rather than seized property.

It does seem like it's to be -- notify within 20 days of finding such property. This property was never lost exactly, but...

MR. STODDARD: Well, the government's position would be that Mr. Henderson received actual notice of the seizure on June the 9th, 2006, when the FBI came to his house and took possession of the firearms and maintained possession of those firearms up through and during the time of the pendency of the charges, the adjudication of guilt, and the conviction.

THE COURT: All right. The -- but the form that -- I think Ms. Pellicciotti signed as receiving

them, lists -- there's four boxes on it, received from, returned to, released to, or seized. And that says received from. It does not check seized.

MR. STODDARD: It does say received from, Your Honor. That is correct.

THE COURT: I mean, is there any magic about how December of -- or January of 2009 was chosen for that letter?

MR. STODDARD: I do not know what generated the letter. I think perhaps just the fact that the weapons were still there, that there needed to be some final adjudication before the weapons could be disposed of by the FBI, would be my -- and that's just a guess on my part.

[30]

THE COURT: The other question I have is under the C.F.R., Title 41, procedures -- it does have, of course, the procedure which Mr. Henderson exercised to appeal the initial denial.

But is there anything in the C.F.R., to your knowledge, that then follows up with a procedure to seek court relief?

MR. STODDARD: None that I'm aware of, Your Honor, other than what would typically be available to someone appearing an administrative action by an executive agency.

THE COURT: Do you know what that is?

MR. STODDARD: I do not.

THE COURT: Okay. And these firearms are still maintained in Jacksonville?

MR. STODDARD: The firearms are still in Jacksonville. Nothing has been done to dispose of them.

THE COURT: Okay. All right. I'll hear the other argument, or whatever else you wish to present.

MR. STODDARD: Very simply, Your Honor, that after Mr. Henderson was adjudicated guilty in 2008 that he lost all rights to do anything with respect to the transfer of these weapons. By doing so, he would have been exercising constructive possession of the weapons.

And as a convicted felon, constructive possession would be an additional felony. And he's prohibited by law

[31]

from doing so.

And he can't seek the court's help or assistance in committing what otherwise would be a felony. And that at that point any attempts he had made prior to the adjudication of guilt and the sentencing, I

think would have -- could have -- certainly would have merit.

But anything done post conviction doesn't, because he's -- he's not -- he doesn't sit in a position to be able to do anything with respect to ownership of the firearms.

THE COURT: All right. Mr. Henderson, do you have any reply to that?

THE DEFENDANT: Your Honor, it's recognized that there have been -- a split decision in the circuit courts over whether it's possible for the government to retain possession of firearms following a criminal conviction without initiating formal forfeiture proceedings.

However, several circuits have held it that forfeiture is barred by failure to commence action within appropriate time frame and the owner stands as a convicted felon.

The owner continues to have a property interest in the firearms, which must be accommodated by the sale, transfer, or storage of the firearms, despite its own possessory right of having it curtailed, *U.S. versus Miller*, 588, and *Watts versus United States*, 2002.

[32]

Directly on point is the more recent case, Your Honor, of *U.S. versus Brown*, and reference a claim

for Bernhard Bastian, Jr., April 9th, 2010, where the facts are virtually identical to the facts of my case.

In *Brown*, the judge issued an order stating that the weapons surrendered by the defendant as a bail condition are no longer being held as a bail condition and the defendant violated his bail and is convicted and sentenced. That may be transferred by the defendant to anyone who may legally possess them.

Moreover, the disposition of property held as a convicted -- condition of the bail is a matter falling well within the court's jurisdiction.

The court rejected the proposition that the firearms lawfully owned must fall in the owner's unrelated felony condition -- conviction, except where they may be unable and wasting, not subject to forfeiture and not subject to confiscation as contraband, and not subject to disposition by the owner or anyone else, or by the court for the owner's benefit.

The court further rejected that such property is subject to government confiscation and destruction in the absence of due process of payment or just compensation.

The remedy fashioned by the *Brown* court and the judge that exercised equitable powers and ordered that the

transfer and title of the firearms lawfully owned but later convicted of a felony were not -- not subject to forfeiture or confiscation as contraband for a felony owner's benefit.

The courts have fashioned solutions that preclude convicted felons from unilaterally dictating or directing, get possession of their unlawfully owned firearms while avoiding serious constitutional issues under the Takings Clause while protecting the felon owner's legitimate property interest.

And, Your Honor, I'm here pro se. I'm not an attorney. So that's -- I presented the facts of the case and everything I have in this. And that's the best I can do.

THE COURT: All right. Thank you, Mr. Henderson.

Mr. Stoddard, anything else?

MR. STODDARD: Nothing further from the United States.

THE COURT: I'm going to take some time, because I want to be able to look at these exhibits more carefully. The -- there clearly is a split in authority, Mr. Henderson. I'll go ahead and point this out.

And as Mr. Stoddard cited, the *Howell* case in the Eleventh Circuit, which is, as you probably know, the circuit that we're under here in Jacksonville --

and the *Howell* case clearly says that a convicted felon cannot either take a return of the weapons, and also was not entitled to constructive possession of the weapons in the form of a trust,

[34]

or to be able to get the sale or distribution of the proceeds for the weapons should they be sold.

So that's -- that case is binding on this court. I will note that in that action the Eleventh Circuit, as some other circuits, have indicated that a proper procedure perhaps to get damages, if you believe they were unjustly taken from you, would be under 42, U.S. Code, Section 1983.

That's in a footnote in the *Howell* case that we -- the Eleventh Circuit expressed no opinion on whether you may file an action under that -- that statute. Other circuits have indicated that would be appropriate.

However, in -- the *Brown* case, as you said, is probably the only other case I've seen where the firearms initially were surrendered as a condition of bail, which is different than most of the cases involving firearms.

But they still clash at some point once you become adjudicated guilty and were sentenced. That's where the problem comes in.

Under *Brown*, the -- you're correct. The way I

read that case, you might be able to get the benefit of it. But that's not the Eleventh Circuit case, unfortunately.

On the other hand, the Eleventh Circuit perhaps has never faced this exact issue. So if I do rule against you, you could either appeal to the Eleventh Circuit or you could consider filing a separate action under 42, U.S. Code, Section

[35]

1983.

But I do want to digest the documents, the various letters, and the attachments to those, as well. Frankly, I don't find the C.F.R. procedures adequate in a case like this. And they don't really address the situation directly.

I, frankly, cannot consider these ever abandoned, given the circumstances which they were given and the fact that he contacted the court -- or, I mean, the FBI, rather, as early as 2008, while still serving as -- his sentence.

It would have been better had you tried to transfer ownership prior to being adjudicated in the case. But I understand you had other things on your mind at that point, probably, as well.

THE DEFENDANT: That's correct.

THE COURT: And it's a little bit unusual --

it's not unheard of, clearly, but to have these firearms surrendered to the -- into the agency as a condition of bond -- I've had cases where they've been released to some other person or placed in a gun safe, someplace like that, but -- so this is a different fact situation than most of these cases.

So I will read these and get an order out as soon as possible on it. I do appreciate the research you've done, Mr. Henderson. You -- as a pro se person, you've --

THE DEFENDANT: Thank you, Your Honor.

[36]

THE COURT: -- thoroughly spent some time on it and devoted to it. And I understand that.

On the other hand, again, as I mentioned, I am faced with the Eleventh Circuit law and have to follow that. So we'll -- we'll compare the two and see how they come out and get an order out as soon as we can.

Anything else we can take up on this today?

MR. STODDARD: Nothing further from the United States.

THE DEFENDANT: Nothing personal, Your Honor.

THE COURT: All right. Thank you. We'll be

in recess.

COURT SECURITY OFFICER: All rise. This Honorable Court is now in recess.

* * *

Appeal of Denial of Motion to Return Property Under Rule 41(g)
C.A. Dkt. Date June 27, 2013

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
56 Forsyth Street, N.W.
Atlanta, GA 30303

United States of America

v. **Appeal No. 12-14628-CC**

Tony Henderson,

Appeal of Denial of Motion to Return Property under Rule 41(g)

Introduction:

Defendant, Tony Henderson, pro se, appeals the Denial of the Motion for Return of Property dated August 8, 2012, by U. S. District Court, Middle District of Florida, Jacksonville Division, Florida. The District Court erred in relying on U.S. v Howell, 425 F.3d 971(11th Cir. 2005) which is factually distinguishable from this case. The facts of this case are not in dispute.

Facts:

A. My Collection

For approximately twenty (20) years, I have been collecting firearms and memorabilia for a hobby. My father and I enjoyed hunting together, and I also gave my son and stepson two rifles in order to get them interested in the sport. When my father passed away, I inherited several rifles and guns from him which were to be passed on to my son, stepson and daughter from their grandfather. As a law enforcement officer with the U.S. Border Patrol, I also collected several firearms as a hobby and enthusiast. The firearms collection, (hereinafter "Collection") belonging to my family and I. It consisted six (6) hunting rifles, three (3) hunting shotguns, five (5) handguns including a commemorative collectible Border Patrol handgun, two (2) collectible rifles including a M1A1 Garand from Vietnam, and a Enfield from WWII, two (2) inoperable display only weapons including a Black Powder muzzle loader wall hanger replica and a Japanese Arisika rifle, one (1) bow & arrow Crossbow, and ammunition valued at approximately $8,000.00. The total Collection consisted of eighteen (18) firearms including two inoperable rifles, one (1) bow & arrow Crossbow and five (5) assorted rifle ammo magazines.

The Collection pieces were all 20 to 100 years old. In addition to the pieces that were part of an inheritance, the other pieces were purchased during my marriage with marital assets with my wife, Linda.

B. Surrender for Safekeeping

On June 7, 2006 I was arrested as a result of a complaint issued in the Middle District of Florida, Jacksonville Division. After being charged with a criminal offense, the Judge had stated that as a condition of my bond, he was requesting that I voluntarily turn over all firearms at my home to the FBI, due to my mental distress and because I was a law enforcement officer. On June 9, 2006, I voluntarily turned over the entire contents of my firearms for safe keeping.[1] When I turned over my Collection, the FBI provided me a property receipt and inventory which indicated the listed property was "received from" Tony Henderson.[2] (Exhibit 1). The firearms in the Collection have never been alleged to be involved in any criminal activity or to have been purchased from proceeds of criminal activity[3].

C. Judicial Proceedings

On November 30, 2007, I pled guilty to a drug offense. The plea agreement made no mention of the Collection and did not include a forfeiture count. On

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[1] The FBI attempted to take possession of the entire contents of my safe which also included non-firearms items such as my collection of baseball trading cards and coins. My attorney objected to this expanded taking.

[2] Note the property receipt is incorrectly numbered, as the number 10 listed twice. There were actually 20 items of property turned over.

[3] The Cross Bow and two non-functional rifles are not considered firearms or contraband.

April 21, 2008, I was sentenced to six months imprisonment and probation. I was granted early termination of probation as of June 11, 2010. The conditions of the bond were fully satisfied when I presented myself to serve my sentence in July 2008.

D. Attempt to dispose of property

On December 1, 2008, upon my return from incarceration, I transferred ownership of the Collection to William Boggs. (Exhibit 2). The FBI contacted Mr. Boggs and intimidated and discouraged him to the extent that he withdrew his request for possession of the Collection and cancelled the agreement to purchase the firearms and crossbow for his own collection.

On February 4, 2009, Robert Rosier expressed interest in owning the entire Collection. A Bill of Sale was signed and submitted to the FBI by Mr. Rosier. The FBI advised him they would contact him about taking possession. On December 14, 2009, I contacted the FBI regarding making arrangements for Mr. Rosier to take possession and complete the sale agreement. I was told by Agent Eubanks that the FBI was aware of the request and they were trying to work with the U.S. Attorney's Office regarding the situation and they would be in touch with us.

By letter dated December 16, 2009, 10 months after Mr. Rosier filed a claim, the FBI sent me a "Waiver of Ownership of Firearm, Asset ID: A-06-FBI-00141." The Form reads: "On June 9, 2006, the Federal Bureau of Investigation seized miscellaneous

firearms from Tony Henderson. I understand that the C.F.R. requires that the FBI inform me that I have the opportunity to claim this firearm (41 C.F.R. 128-48.102.1). I understand that if I do not claim this firearm with 30 days of signing this document, the title to the firearm will vest in the U.S. Government." Additionally, the form included a hold harmless clause. This notice was received three years six months and seven days after the property was "received from" me. It was the first notification I had that the FBI considered the property "seized."

Neither Mr. Rosier, Mr. Boggs, my wife, Linda Henderson, my children, nor I received notice of seizure and an opportunity to file a claim for their interest in the Collection. I signed receipt of the document on December 28, 2009, and the same day Mr. Robert Rosier and I filed a letter claiming interest in the Collection. The written claim included a statement of facts and circumstances justifying granting the claim. The claim was also supported by documentary evidence establishing valid, good faith, innocent owner interest in the property. (Exhibit 3) On January 5, 2010, I received a letter from the FBI Counsel stating they were conducting an investigation into the merits of the claim.

On May 21, 2010, I received a letter from the FBI Property Management Officer stating that the claim filed on January 4, 2010 was reviewed and denied. It stated that since I did not have the authority to legally possess firearms, I cannot delegate the authority to any other person. On June 3, 2010, I requested

reconsideration of that decision, which was denied on January 26, 2011.

E. Lack of Notice

Although the Collection was never included as part of any criminal case, I was never given a notice of seizure citing any statute under which the Collection, in whole or in part, was to be seized and potentially forfeited. Mr. Boggs, Mr. Rosier, my wife Linda Henderson, my son, stepson and daughter also received no notice or any opportunity to file a claim for the Collection. In my son's and stepson's case, they were not provided an opportunity to claim their own two rifles.

On June 13, 2010, I filed a Motion to Return or Dispose of Property with the Middle District of Florida, Jacksonville, Florida Division. (Exhibit 4) At that time, I requested return of the Collection and that the property rights of my wife, Linda Henderson, be recognized. I asked that possession and control of the Collection be awarded to her, or in the alternative that Robert Rosier, a non-relative third-party.

On May 27, 2011, the U.S. Magistrate denied the Motion. (Exhibit 5) I timely appealed that Denial. On August 8, 2012, the U.S. District Court Judge adopted the Report and Recommendation as the Opinion of the Court and denied my request to return the property. (Exhibit 6).

Law

Congress has established a strict procedure, placing limits on federal courts by enacting general rules for civil forfeiture proceedings, including proceedings to forfeit firearms. 18 U.S.C. § 983. Congress requires that "any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within 120 days of such seizure." 18 U.S.C. § 924(d)(1); U.S. v. 52 Firearms, 362 F. Supp. 2d 1308 (M.D. Fla., Feb. 10, 2005). The plain and unambiguous meaning of the statutory term "any action or proceeding" includes not only administrative, but also judicial proceedings. Id.

The 11th Circuit held that "forfeitures are not favored, and those seeking forfeiture in this circuit must strictly comply with the letter of the law." See U.S. v. One 1936 Model Ford V-8 DeLuxe Coach, 307 U.S. 219, 226 (1939); U.S. v. $38,000.00 in U.S. Currency, 816 F.2d 1538, 1547 (11th Cir. 1987). When the government misses the deadline to provide notice of seizure and forfeiture to an owner or a party who may have an interest, the government has disabled itself from obtaining an order of forfeiture. U.S. v. Leroy F. Miller, 588 F.3d 418 (7th Cir., Nov. 19, 2009).

Title 18 U.S.C. § 922(g)(1) makes it unlawful for any person with a felony conviction to possess any firearm or ammunition. The term "possess" has been broadly interpreted to include constructive possession. The law is silent as to any other interest that a convicted felon may retain in spite of not being allowed to possess such property. However, owners of

firearms that have been seized by the government in connection with a search or criminal activity are entitled to due process and notice before their property rights are extinguished.

Some Courts have held that under such circumstances, the U.S. must sell the weapons for the felon's account, if, by missing the statutory deadline, it disables itself from obtaining an order of forfeiture. Cooper v. Greenwood, 904 F.2d 302, 304 (5th Cir. 1990).

Although public policy favors law enforcement's requests to confiscate firearms from criminals, it does not relieve them from complying with the statutory requirements set forth by Congress. Courts of equity can no more disregard statutory provisions than can courts of law. United States v. Luis Armando Rodriguez, 2011 U.S. Dist. LEXIS 133109, *16 (W.D. Tex. February 2011); see Holland v. Florida, 130 S. Ct. 2549, 2563 (2010) ("Courts of equity can and do draw upon decisions made in other similar cases for guidance"). "Exercise of a court's equity powers must be made on a case-by-case basis." Id.

Analysis:

The government persuaded me to temporarily give up possession of my Collection, failed to lawfully seize the Collection or give notice of seizure to me or any other interested claimant, and now proposes to take title of the $8,000 collection, permanently. Equity forbids this result.

The December 2009 FBI letter stated, for the first time, that the firearms were "seized" on June 9, 2006; however, no basis for seizure was provided and none existed. The FBI letter specifically cited an abandonment provision, at 41 C.F.R. 128-48.102-1, stating that if the owner of firearms is known, he "shall be notified with 20 days of finding such property" and he would then have thirty (30) days from the date of the notification letter to claim the property.[4] Under the most generous reading of this statute, and if the Court holds that forfeiture could not be commenced until the release of the bond, July 8, 2008, notice was not provided until December 2009, 17 months later. Thus, both the forfeiture and the abandonment statutory notice requirements were not met.

There is no question that the FBI failed to give proper notice of either abandonment and/or seizure to all parties that it knew had an actual interest or an apparent interest in the property. Whether or not any party could have prevailed is not relevant to the analysis of whether or not the government had a statutory duty to provide notice. The result of failure to give notice and an opportunity for due process is

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[4] By including a hold harmless provision in the notice of seizure provided by the FBI on December 16, 2009, it endeavored to protect its agents from legal action under 42 U.S.C. § 1983. It was at a minimum, deceitful, and calculated to protect its own shortcomings. However, a legal action under the Tucker Act may be more appropriate, but is still additional litigation over an issue that can be resolved within equitable legal precedent.

that the government is now unable to obtain an order from the Court for forfeiture.

Based on the government's failure to provide timely notice and due process, my interest in the property continues even though my possessory interest has been curtailed. U.S. v. Leroy F. Miller, 588 F.3d 418, 420 (7th Cir., Nov. 2009). Due to the government's own inaction, it is now disabled from obtaining an order of forfeiture. Id. at 419, Cooper v. Greenwood, 904 F.2d at 304. That is exactly the posture that this Court finds itself today with this case.

What that failure of notice has done is also to divest my wife of her marital asset. My wife has no bar to owning and possessing any firearm in her own right. Just because she owns a firearm cannot just be assumed to be constructive possession for me without offering her a procedure to state her claim. There are numerous alternatives for her to store and maintain her own firearms which do not afford me influence and control. Such a holding would unconstitutionally interfere with her own right to own and bear arms as provided by the Second Amendment without due process. By failing to give proper notice and an opportunity to claim their own property, my son, stepson and daughter are having their rights trampled. My children are adults and have the right to have access to the Collection their grandfather intended them to have. The government seeks to deny them access and rights to their property without benefit of due process based on a criminal conviction of which they had no part and have not been alleged to have had any part. As explained, all of the Collec-

tion was either purchased with marital assets, independently owned by my son and stepson, or were inherited from my father to inure to my children's benefit in the future. There has been no explanation or consideration of their legitimate interests.

This case is not about 18 U.S.C. § 922(g). I am not asking for the return of the Collection to my possession or constructive possession. However, there is no language in 18 U.S.C. § 922(g) that automatically divests a convicted felon of all of his property interest and the attending financial value. While the language does curtail actual possession and interstate commerce, it does not, in any way, limit my residual property interest that could be transferred by process of intestate inheritance, marital dissolution property settlement of marital assets, or sale by trust for the benefit of the owner, as a few examples of potential ownership rights. There is certainly no language that divests my wife, son and stepson from their own interests. The Crossbow (bow and arrow) is not even a firearm and the inoperable Black Powder replica wall hanger and nonfunctional Japanese Arisika are not even covered by 18 U.S.C. § 922(g), but no distinction has been made as to what may be prohibited.

Under the circumstances as described here, the other impairment is that the government had no basis for seizure or forfeiture and has yet to provide any such legal basis. The government could have avoided this situation from the first day by putting me on notice that I was at liberty to sell or otherwise dispose of the firearms at any time prior to the final resolution of the case. The Court could have put me on no-

tice of the consequences of a plea while my Collection remained with the FBI for my own protection. I could have sold or transferred the Collection prior to any plea in order to pay for defense, or to support of my family during the pendency of the proceedings. I could have returned my son's and stepson's rifles to them for their own safekeeping and allowed my wife to secure her property in any way she deemed appropriate without providing me access.

The deprivation of my property came as a surprise to me. Placing the Collection for safekeeping with the FBI rather than a neutral party authorized to sell the property, had the effect of depriving me of the ability to dispose of the property prior to my conviction and yet being unable to recover the value or have the title and control assigned to my wife and/or a neutral. From the moment I delivered the Collection at the government's request, the property was encumbered with the bond and deprived me of my ability to sell or dispose of the property so that I could not benefit from the value of my legally owned collection of firearms. Under other circumstances, my wife and I could have sold them as a collection or one-by-one to legitimate buyers at a fair price. We could have determined if there were other viable alternatives that better suited the intent of my father when he passed his collection to me.

But this Court is not without options to resolve this stalemate. Because in this case the government's failure to give notice of seizure precludes forfeiture of my residual property interest and because the government does not have any way to dispose of

the property by sale or destruction, this Court must look to an equitable solution.

The 5th Circuit held that firearms are not contraband *per se*. Cooper v. Greenwood, 904 F.2d 302, 304 (5th Cir. 1990). It specifically held that that although a convicted felon cannot legally possess a gun, he continues to have a property interest, limited to an ownership interest. Id. at 306. Every claimant has a right to his day in court and, regardless of his chances of success. He has a right to apply for remission or mitigation. Id. With proper notice, other persons who had an interest could have had the opportunity to also assert their claims. Id. The 5th Circuit concluded that because the government did not institute a forfeiture action, the United States must sell the weapons for the felon's account because, by missing the statutory deadline, it disabled itself from obtaining an order of forfeiture. Id.

The 7th Circuit held that if the United States does not want to sell firearms for the felon's benefit, that it must offer him some other lawful option: having a trustee sell or hold the guns, or giving them to someone who can be relied upon to treat them as his own. United States v. Miller, 588 F.3d 418, 420 (7th Cir., Nov. 2009). In this case there is no evidence that my wife, adult children, or Mr. Rosier have abandoned their right to own and treat the Collection as their own, if so entrusted.

Persuasively, the Second Circuit, just a few months ago, had occasion to weigh in on this issue and adopted the position taken in U.S. v. Miller, 588

F.3d 418. That Circuit concluded that under limited circumstances a convicted felon may arrange to benefit from the sale of otherwise lawful, unforfeited firearms by a third party without actually or constructively possessing them. U.S. v. Zaleski, 212 U.S. App. LEXIS 14435, *7-*8 (2nd Cir. July 2012). The possibility that a felon will receive a financial benefit from a trustee's sale of firearms to compensate him for his non-possessory property interest in them does not, standing alone, mean that he constructively possesses them. Id. The Zaleski court also found that it is not a windfall to allow a felon to retain the value of property that he lawfully possessed before he was convicted and that is not subject to forfeiture, nor did it appear that the arrangement would impose a substantial burden on the government because the transferee would liquidate the weapons. Id. at FN3.

Similarly is the case, U.S. v. Brown, In re: Claim of Bernhard Bastian Jr., 2010 U.S. Dist. LEXIS 35358 (D.N.H. 2010) where as a condition of bail, Brown voluntarily surrendered his firearms and it was agreed the firearms would be held by a neutral third party pending the resolution of the charges and that he would pay all storage charges. While the government argued that a convicted felon cannot lawfully divest himself of mere legal title to firearms that he can no longer lawfully possess, without thereby "constructively possessing those firearms," the court held that such a conclusion stretched the concept of "constructive possession," as the term is used in the criminal statute prohibiting possession by felons. (18 U.S.C. 922(g). Id. at *7. The court noted that no precedent was cited by the government that

held that mere continuing ownership of firearms following a felony conviction, without more, amounts to constructive possession. "It seems inconsistent to contend on the one hand that continued ownership of firearms does not amount to constructive possession, but, on the other hand, terminating one's ownership interest does." Id. *8-9. "Firearms subject to neither lawful forfeiture nor confiscation as contraband remain valuable tangible personal property belonging to the convicted felon." Id. at *10. The Brown court rejected the premise that "firearms lawfully owned must, following the owner's unrelated felony conviction, sit wherever they may be, unalienable and wasting, not subject to forfeiture, not subject to confiscation as contraband, and not subject to disposition by the owner, or by anyone else, or by the court for the owner's benefit." The court further rejected that the property could be destroyed in the absence of due process or payment of just compensation." Id. at * 14.

Finally, in U.S. v. Parsons, the District Court for the Northern District of Iowa, distinguished that case from U.S. v. Felici, 208 F.3d 667 (8th Cir. 2000), in that in Parsons, the convicted felon asked to have his personal collection of firearms transferred to his friend who would sell some and keep some, and would alone determine what to do with the proceeds. 474 F. Supp. 2d, 1169, 1175. In Felici, the defendant sought to have the firearms in trust for him by a third party. Id. The court noted that the two cases each had a defendant who was not a convicted felon at the time he acquired the firearms. The government had no basis to seize the firearms as part of any

criminal matter. But the court found that a defendant like Parsons would have been free to lawfully dispose of his firearms in the manner he sees fit prior to pleading guilty but for the intervention of the government's seizure and continued possession of the firearms. Id. at 1177. That is exactly the facts in my case. The government has no basis for seizure and has never alleged that to the contrary. Rather they were acting as a bailee for the convenience of the court while the case was pending. Nothing happened that converted that mere bailee relationship into a forfeiture of my ownership interest. The Parsons court noted that "as a general principle, equity abhors waste, and delights to restrain it in a proper case." Id. at 1175, citing Finney County Water Users' Ass'n v. Graham Ditch Co., 1 F.2d 650, 652 (D. Colo. 1924). Therefore, the court allowing Parsons to designate a friend to receive the property to treat as his own did not give him constructive possession.

The Court below incorrectly relied on the decision in U.S. v. Howell, 425 F.3d 971,972-73 (11th Cir. 205). That decision held that the United States is not obliged to confer a benefit on a felon by selling guns as his agent, and that transferring the guns to a straw owner would permit the felon to maintain unlawful constructive possession of the weapons. However, the facts in my case are distinguishable in that my Collection was never seized. In Howell, the firearms were part of a search and were ultimately seized during the arrest. It appears that Howell had a receipt indicating that that property was "seized." He, and any other potential claimants, were on notice. In my case, the Judge in the bond hearing indi-

cated the weapons were being held as a means to ensure my own safety and not for any other purpose than custodial safeguarding. That was the reason that my wife's and my son's, stepson's and daughter's property were also turned over at that time. The property receipt specifically did not check the box for seizure or abandonment. It listed the firearms as "received" giving no indication of urgency in divesting myself of ownership. In my case, there is no straw owner Therefore, the holding in Cooper and Zaleski, rather than Howell, applies.

The examples in Cooper, Zaleski, Miller and Parsons give this Court guidance as to how to fashion an equitable remedy without running afoul of 18 U.S.C. § 922(g). These decisions are all post-Howell and show the trend of the District and Circuit courts throughout the country. As an appropriate remedy, the Court has broad authority to define an equitable solution so the government does not profit from its own violation of statutory notice requirements and I do not control the property, in violation of law. Equity can accomplish both goals.

The court may separate out the items that are not subject to the bar under 922(g), and return them to me. The court can order the transfer of title to the remaining Collection and order a sale for my account. U.S v. Miller, 588 F.3d at 419. That would preclude me, as a convicted felon, from unilaterally dictating or directing disposition, as some courts have found objectionable, and it avoids the constitutional issues arising under the *Takings Clause,* while it fully protects my legitimate property interests. I am not set-

ting the value, directing the sale or purchase of the firearms, but am merely compensated for the value of my property by a neutral third-party, subject to any commission for such sale. The court can set such conditions as it deems necessary. See U.S. v. Rodriguez, 2011 U.S. Dist. LEXIS 133109, at *54. Finally, the court can allow me to designate a third-party who can lawfully take possession of the Collection and treat it as his own.

The Supreme Court expects the Circuits to be able to define equity on a case-by-case basis and fashion remedies that are appropriate. Holland v. Florida, 130 S. Ct. 2549, 2563 (2010). This Court can recognize that early notice would have remedied this situation and that I am without fault in that regard. The government should not profit from its refusal to notify or consider claimants, by gleefully taking title to an $8,000 collection. I immediately took all steps to attempt to resolve the issue while the FBI failed to do the bare minimum, and even led me to believe that they could/would turn the Collection over to Mr. Boggs or Mr. Rosier. Until December 16, 2010, after my extensive efforts to resolve the issues with my property, I had no idea that safeguarding my property would result in the loss of any financial benefit associated with my lawful ownership.

Finally, failing to grant equitable relief, results in imposition of a fine or penalty not imposed by the sentencing judge at the time of the conviction. It was not contemplated by the sentencing judge and the loss of value of my Collection without compensation results in a windfall to the government and no legal

basis to do so. Equity requires this Court to do better.

Conclusion:

I hereby respectfully request that this Court recognize my wife and my adult children's independent ownership interest in the Collection turned over to the FBI as a condition of my bond. I also request that the Court separate and return the property to me that is not covered by 18 U.S.C. § 922(g), i.e., the Crossbow and inoperable replica wall-hanging Black Powder and nonfunctional Japanese Arisika. Alternatively, I request that the Court recognize my continued ownership interest in the property value and order its sale for my benefit or my wife's or adult children's benefit or allow me to designate a neutral third party to take possession as his own..

Dated: June 24, 2013.

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
DEC - 8 2014
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No. 13-1487

In the Supreme Court of the United States

TONY HENDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

"The general rule is that seized property, other than contraband, should be returned to its rightful owner once * * * criminal proceedings have terminated." *Cooper* v. *City of Greenwood*, 904 F.2d 302, 304 (5th Cir. 1990) (quoting *United States* v. *Farrell*, 606 F.2d 1341, 1343 (D.C. Cir. 1979) (quoting *United States* v. *La Fatch*, 565 F.2d 81, 83 (6th Cir. 1977))). 18 U.S.C. § 922(g), however, makes it "unlawful for any person * * * who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year * * * to * * * possess * * * any firearm."

The question presented is whether such a conviction prevents a court under Rule 41(g) of the Federal Rules of Criminal Procedure or under general equity principles from ordering that the government (1) transfer non-contraband firearms to an unrelated third party to whom the defendant has sold all his property interests or (2) sell the firearms for the benefit of the defendant. The Second, Fifth, and Seventh Circuits and the Montana Supreme Court all allow lower courts to order such transfers or sales; the Third, Sixth, Eighth and Eleventh Circuits, by contrast, bar them.

TABLE OF CONTENTS

Page

Table Of Authorities IV

Opinions Below 1

Jurisdiction 1

Statutory Provision And Rule Involved 1

INTRODUCTION 1

STATEMENT 3

A. Legal Background 3

B. Factual Background 5

C. Procedural History 7

SUMMARY OF ARGUMENT 10

ARGUMENT 14

I. BECAUSE § 922(G) PROHIBITS ONLY POSSESSION, IT DOES NOT BAR THE TRANSFER OR SALE OF FIREARMS TO APPROPRIATE THIRD PARTIES 14

A. "Possession" Has A Clear, Long-Established Meaning Distinct From Other Incidents Of Ownership 15

B. The Eleventh Circuit's Expansion Of Possession To Include Nonpossessory Interests Is Inconsistent With The Structure Of The Statute And Multiple Canons Of Statutory Construction 20

C. The Eleventh Circuit's Rule Turns § 922(g)'s Purpose On Its Head 23

D. The Eleventh Circuit's Broad Theory Of Possession Allows The Government To Effectively Accomplish A Forfeiture Of Noncontraband Property Without Providing Any Process 25

E. The Eleventh Circuit's View Of Possession Must Be Rejected Because It Raises Serious Constitutional Doubts 28

II. THE ELEVENTH CIRCUIT WRONGLY APPLIED THE DOCTRINE OF UNCLEAN HANDS 35

III. RULE 41(G) AND EQUITY BOTH PERMIT THE COURTS TO ORDER THE TRANSFER OR SALE OF FIREARMS TO AN APPROPRIATE THIRD PARTY 40

CONCLUSION 42

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United States v. *Craft*, 535 U.S. 274 (2002) 20

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United States v. *Kaczynski*, 551 F.3d 1120 (9th Cir. 2009) 37

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Statutes and Rules:

18 U.S.C. § 229(a)(1) 22

18 U.S.C. § 229A(a) 22

18 U.S.C. § 229B(a) 22

18 U.S.C. § 921(a)(3) 5

18 U.S.C. § 922(g) ..... *passim*

18 U.S.C. § 922(j) 21

18 U.S.C. § 924(d)(1) 21, 26, 27

Statutes and Rules—Continued: **Page(s)**

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is unreported but available at 2014 WL 292169. The order of the district court (Pet. App. 5a-6a) adopting the magistrate judge's report and recommendation is unreported. The magistrate judge's report and recommendation (Pet. App. 7a-14a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 2014. On April 17, 2014, Justice Thomas extended the time for filing a petition for a writ of certiorari until June 27, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION AND RULE INVOLVED

Section 922(g) of Title 18 of the United States Code provides, in pertinent part, that "[i]t shall be unlawful for any person * * * who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year * * * to * * * possess in or affecting commerce[] any firearm or ammunition."

Rule 41(g) of the Federal Rules of Criminal Procedure provides, in pertinent part, that "[a] person aggrieved by * * * the deprivation of property may move for the property's return."

INTRODUCTION

This case concerns an important question at the intersection of criminal and property law. Title 18 U.S.C. § 922(g), the purpose of which is to "keep guns out of the hands of those who have demonstrated that they may not be trusted to possess a firearm without becoming a threat

to society," *Small* v. *United States*, 544 U.S. 385, 393 (2005) (internal quotation marks omitted), bars a convicted felon from "*possess*[*ing*] * * * any firearm or ammunition," 18 U.S.C. § 922(g) (emphasis added). The government contends, however, that it also tacitly extinguishes a person's entire ownership interest in firearms that are unrelated to the offense of conviction.

Petitioner was a United States Border Patrol Agent who surrendered his firearms to the FBI as a condition of bond while unrelated marijuana charges were pending against him. Following petitioner's guilty plea and service of his six-month sentence, the FBI refused to transfer his personal firearms to an unrelated third party who had purchased them. In response, petitioner filed a motion asking that the guns be transferred to the buyer or, alternatively, to petitioner's wife. The courts below held that allowing petitioner to transfer his non-possessory interests in his firearms to an unrelated third party would be tantamount to giving him "constructive possession" over them. Pet. App. 4a (citing *United States* v. *Howell*, 425 F.3d 971, 976-977 (11th Cir. 2005)); *id.* at 13a-14a (same). Alternatively, they held, once petitioner was "convicted of a drug offense [he] had unclean hands to demand" transfer of his firearms, "even though [he] did not use those firearms in furtherance of his offense." *Id.* at 4a; *id.* at 11a-12a, 14a (same).

The Eleventh Circuit's decision is wrong. It allows the government to use a statute that bars *possession* of firearms to dispense with formal forfeiture procedures and effectively strip citizens of their entire ownership interest in what are often significant household assets even when their convictions have nothing to do with those assets. And it deprives them of assets they could use to contribute to the support of their dependents at the very

time that imprisonment prevents them from supporting the household with employment income. If taken seriously, moreover, the Eleventh Circuit's alternative holding—that a felon's unclean hands bar her forever and everywhere from equity—would reinstate "the ancient common-law doctrine of 'outlawry' * * *—a theory which could not be admitted without violating the rudimentary conceptions of the fundamental rights of the citizen." *Hovey* v. *Elliott*, 167 U.S. 409, 444 (1897). The result—that felons cannot *completely* alienate firearms that they own but do not possess—is particularly perverse since § 922(g)'s whole purpose is to keep guns out of the hands of potentially dangerous people. The judgment of the Eleventh Circuit must be reversed.

STATEMENT

A. Legal Background

"The general rule is that seized property, other than contraband, should be returned to its rightful owner once * * * criminal proceedings have terminated." *Cooper* v. *City of Greenwood*, 904 F.2d 302, 304 (5th Cir. 1990) (quoting *United States* v. *Farrell*, 606 F.2d 1341, 1343 (D.C. Cir. 1979) (quoting *United States* v. *LaFatch*, 565 F.2d 81, 83 (6th Cir. 1977))). Title 18 U.S.C. § 922(g), however, makes it "unlawful for any person * * * who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year * * * to * * * possess * * * any firearm." This case involves the intersection of these two rules.

In *United States* v. *Howell*, 425 F.3d 971 (11th Cir. 2005), the Eleventh Circuit first held that § 922(g) bars a court from ordering the government to transfer firearms within its possession, but owned by a felon, to a third party. It rejected a Fifth Circuit precedent, *Cooper* v.

City of Greenwood, 904 F.2d 302 (5th Cir. 1990), in which the court had held that a felon's "claimed *ownership* interest in [his noncontraband] firearms survived his criminal conviction and could not be extinguished without according him due process." 425 F.3d at 976 (quoting *Cooper*, 904 F.3d at 304) (emphasis added). It adopted instead the holding and reasoning of *United States* v. *Felici*, 208 F.3d 667 (8th Cir. 2000). In that case, the Eighth Circuit rejected the argument that the government could transfer to a third-party trust noncontraband firearms it had seized from a person convicted of a felony. 208 F.3d at 670. The Eleventh Circuit adopted *Felici*'s holding that "[f]ederal law prohibits convicted felons from possessing guns. * * * [A] request [for transfer to a third party] suggests constructive possession. Any firearm possession, actual or constructive, by a convicted felon is prohibited by law." *Howell*, 425 F.3d at 976-977 (quoting *Felici*, 208 F.3d at 670).

In *Howell*, the Eleventh Circuit rejected third-party transfers for an alternative reason as well. "[I]n order for a district court to grant a Rule 41(g) motion," it held,

> the owner of the property must have clean hands. The doctrine of "unclean hands" is an equitable test that is used by courts in deciding equitable fate. The defendant in the instant case[, solely by virtue of his status as a felon,] has come into court with extremely "unclean hands." One engaged in this type of criminal conduct is hardly entitled to equitable relief.

425 F.3d at 974 (citation omitted). No other court of appeals takes this position. The courts of appeals routinely allow felons to seek the return or transfer of noncontraband property through Rule 41(g) or other

equitable mechanisms provided they meet applicable requirements. See Pet. 14-16.

B. Factual Background

1. In early June 2006, petitioner, who at the time was a United States Border Patrol Agent, was arrested and charged with distributing marijuana. Pet. App. 2a. At petitioner's bond hearing, the government requested and the magistrate judge required that petitioner surrender his firearm collection to the government as a condition of his bond. J.A. 23, 28, 30. That collection, which "ha[d] been owned by [his] family * * * for many years," J.A.159, included a crossbow, a "nonfunctional" antique "Japanese Arisika * * * rifle," a nonfunctional "wall [h]anger," and a "nonfunctional" "[h]omemade muzzle-loading rifle," see J.A. 45, 102, 103. None of those identified items is classified as a firearm under federal law, see 18 U.S.C. § 921(a)(3), and § 922(g) does not bar a felon from possessing any of them. Other firearms included three M1 Garand rifles dating from World War II and the Vietnam War, a group of .22 caliber rifles and pistols, two shotguns, a carbine, and several revolvers. J.A. 101-104. In all, petitioner turned over approximately eighteen firearms[1] and other items valued at $3,570.92[2]. See J.A. 50-56. On the "Receipt for Property" it issued petitioner, the FBI marked the box indicating that the items were "[r]eceived [f]rom" him; it left unmarked the box

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[1] The Eleventh Circuit's opinion refers to "nineteen personal firearms." Pet. App. 2a. The various inventories disagree, however, as to the exact number. The government agrees that the exact number of firearms is not material to the legal issue. Br. in Opp. 3 n.1.

[2] This total excludes the value of petitioner's service firearm, which is included in the government's appraisal. See J.A. 52 (listing value of service revolver at $ 136.44).

indicating that items were "[s]eized" from him. J.A. 43, 45.

Petitioner later pleaded guilty to one drug charge and was sentenced to six months' imprisonment and 24 months of supervised release, including four months of home detention. Clerk's Mins. Proceedings of Sentencing, D.C. Dkt. No. 144. The court later shortened his term of supervised release without opposition from the government or the Bureau of Prisons. Order, D.C. Dkt. No. 154.

2. Soon after he began serving his sentence, Mr. Henderson asked the FBI through his attorney "what steps need to be taken to transfer the firearms." J.A. 78; Pet. App. 9a. He received no response. *Ibid.* Shortly after serving his sentence, petitioner contacted the FBI again to arrange for the transfer of his firearms to a third party. *Ibid*; J.A. 80-81. Following the FBI's instructions, petitioner submitted a letter describing his case together with a bill of sale and the contact information for the buyer, William Boggs. Pet. App. 9a-10a; J.A. 80-84. When Mr. Boggs later chose to withdraw from the transaction, Mr. Henderson arranged to sell his ownership interest in the firearms to Robert Rosier and again submitted the requested paperwork to the FBI. Pet. App. 10a; J.A. 85-89.

After receiving no response for more than a month, petitioner wrote another letter to the FBI and on four different occasions between April and June 2009 attempted to contact an agent familiar with the case. Pet. App. 10a. Twelve months after submitting a signed bill of sale, petitioner received a letter from the Jacksonville FBI office asserting that the Bureau had "seized" his firearms on June 9, 2006—the date he complied with the

magistrate judge's order to surrender the firearms—and notifying him of the procedure for submitting claims. *Ibid.* In December 2009, petitioner and Mr. Rosier filed a claim with the FBI requesting that the agency transfer ownership to Mr. Rosier. Pet. App. 10a-11a. Four to five months later, the FBI rejected the claim, asserting that "the release of the firearms to you or your designee, Robert Rosier * * * would place you in violation of federal law as it would amount to constructive possession." J.A. 121 (citing *Howell*, 425 F.3d at 976-977, and *Felici*, 208 F.3d at 670). The letter advised that petitioner had 10 days to request reconsideration, which he did. J.A. 122-125.

C. Procedural History

1. After receiving no response for another month, petitioner, proceeding pro se, filed a motion in district court, asking that the firearms be transferred to Mr. Rosier or petitioner's wife. Pet. App. 2a; J.A. 38-56. In his motion, he invoked the federal courts' "equitable powers" as authority for ordering the transfer. J.A. 39-40 (citing cases). In its response, the government recharacterized Mr. Henderson's general equitable motion as "a motion pursuant to Fed. R. Crim. P. 41(g)," J.A. 59; see Br. in Opp. 4 (noting "[t]he government construed the motion as having been filed under Rule 41(g)"), a provision that petitioner had never invoked, see J.A. 38-56. The magistrate judge assigned to the case withheld action until the FBI issued a final agency decision on petitioner's request for reconsideration. Order Taking Under Advisement, D.C. Dkt. No. 160. Finally, in January 2011—more than two years after petitioner first sought to transfer his ownership interest in the firearms—the FBI issued its final decision denying his appeal. Pet. App. 11a; J.A. 74. Mr. Henderson then

renewed his motion before the district court. See J.A. 66-73. Again, he invoked the federal courts' "equitable powers" and did not mention Rule 41(g). See J.A. 72.

2. The magistrate judge took up petitioner's motion for return of property and, following the government's lead, treated it as if it had been filed under Rule 41(g). See Pet. App. 11a. That rule provides, in relevant part, that "[a] person aggrieved * * * by the deprivation of property may move for the property's return." Fed. R. Crim. P. 41(g). Although recognizing that federal courts were divided on whether firearms "to which a convicted felon has legal title, but not possession, can be sold for the owner's benefit" without attaching constructive possession to him, Pet. App. 13a, the magistrate judge recommended denying petitioner relief because it was "bound by *Howell*," *ibid.*, the controlling circuit precedent. "Although the firearms were neither seized from [petitioner], nor constituted contraband, nor were they forfeited," *id.* at 13a-14a, *Howell* dictated that "allowing a defendant to transfer the firearms or receive money from their sale would be constructive possession" prohibited by § 922(g), *id.* at 12a. The magistrate judge also noted that *Howell* had held "that to prevail under Rule 41(g), the owner must have 'clean hands' * * *, but a defendant convicted of a drug offense has 'unclean hands' and is not entitled to equitable relief." *Id.* at 11a-12a.

3. Mr. Henderson then filed objections to the magistrate judge's report and recommendation. J.A. 126-133. He mentioned Rule 41(g) only once—as a "mean[s] to provide equitable relief." See J.A. 131. He argued, among other things, that *Howell* was distinguishable, J.A. 127-132, and that the magistrate judge and the government were confusing possession of the firearms with their ownership, J.A. 130-131. In particular, he

claimed that the government was wrongly "equating criminal constructive possession with even the most minimal exercise * * * of ownership transferring legal title (and, ironically, thereby divesting title to personal property that the owner may not lawfully possess)." J.A. 130. The district court, however, adopted the magistrate judge's report and recommendation as the opinion of the court and denied the motion. Pet. App. 5a-6a.

4. Still proceeding pro se, petitioner appealed. His brief mentioned Rule 41(g) only in a single argument header, see J.A. 177, and argued instead that general principles of equity supported relief, see, *e.g.*, J.A. 184 ("Equity forbids this result."); J.A. 189 ("[T]his court must look to an equitable solution."); J.A. 194-195 ("[F]ailing to grant equitable relief[] results in imposition of a fine or penalty not imposed by the sentencing judge[.] * * * Equity requires this Court to do better."). He also renewed his argument that § 922(g) extinguished only his possessory interests in his firearms, not the remaining ownership interests. J.A. 187, 190-192 (citing cases). In addition, he outlined several different equitable means through which the courts could grant him relief, including "order[ing] a sale [of the items covered by § 922(g)] for [his] account." J.A. 193 (citing *Miller*, 588 F.3d at 419). He argued that such a disposition

> would preclude me, as a convicted felon, from unilaterally dictating or directing disposition, * * * and it avoids the constitutional issues arising under the Takings Clause, while it fully protects my legitimate property interests. I [would] not [be] setting the value, directing the sale or purchase of the firearms, but [would be] merely compensated for the value of

> my property by a neutral third-party, subject to any commission for such sale.

J.A. 193-194 (emphasis omitted). He further noted that "[t]he court can set such conditions as it deems necessary." J.A. 194.

The court of appeals affirmed the district court's denial of relief. Pet. App. 1a-4a. The court held that granting petitioner's motion and transferring the firearms to a third party would violate 18 U.S.C. § 922(g) by placing him in constructive possession of the firearms he had surrendered to the FBI. See *id.* at 4a. Although acknowledging "cases from other circuit and district courts which afforded defendants relief," *id.* at 3a (citing, *inter alia*, *United States* v. *Zaleski*, 686 F.3d 90 (2d Cir. 2012), *United States* v. *Miller*, 588 F.3d 418 (7th Cir. 2009), and *Cooper*, 904 F.2d at 302), the court denied relief because "our decision in *Howell* controls," *id.* at 4a. The court, again following *Howell*, held in the alternative that petitioner could not invoke equity at all: "Mr. Henderson's equitable argument rings hollow. We held in *Howell* that a defendant convicted of a drug offense ha[s] unclean hands to demand return of his firearms even though, as with Mr. Henderson, th[e] defendant did not use those firearms in furtherance of his offense." *Ibid.*

SUMMARY OF ARGUMENT

Title 18 U.S.C. § 922(g) has a clear aim: to "keep guns out of the hands of those who have demonstrated that they may not be trusted to *possess* a firearm without becoming a threat to society." *Small* v. *United States*, 544 U.S. 385, 393 (2005) (internal quotation marks omitted and emphasis added). It achieves that aim straightforwardly by making it "unlawful for any [felon]

to * * * *possess* * * * any firearm." 18 U.S.C. § 922(g) (emphasis added). Neither its purpose nor its text, however, reaches any other property interest an owner has in her firearms, particularly the right to sell or transfer them to another person once the law no longer allows her to possess them.

I. The Eleventh Circuit prohibits a district court from ordering such a sale or transfer because it believes doing so would "deliver[] actual or constructive possession of firearms to [the] convicted felon" in violation of § 922(g). Pet. App. 4a. That premise is mistaken. It misunderstands the plain meaning of the statute's key term by confusing "possession" with other incidents of ownership, ignores the language of closely related statutory provisions, violates the statute's central purpose, allows the government to effectuate a forfeiture without satisfying any of that procedure's strict substantive or procedural requirements, and raises serious constitutional doubts.

A. If a "statut[e's] text is plain and unamibiguous[, the court] must apply the statute according to its terms." *Cacieri* v. *Salazar*, 555 U.S. 379, 387 (2009) (citations omitted). Section 922(g) bars a felon from "possess[ing]" a firearm. Its textual prohibition extends no further. On its face, then, it can bar sale or transfer of ownership only if the act of selling or transferring imputes possession at some point to the owner himself. In other words, it prohibits an owner from completely alienating his property interests in his firearms only if he somehow possesses them in the process of alienating them from himself.

Since a sale of firearms in the government's possession for the owner's benefit would entail no actual

possession on the owner's part, § 922(g)'s bar operates only if it attaches constructive possession to the owner. It does not. Possession and ownership are two separate sticks in the bundle of property rights and a person can transfer one right without affecting the other, as both bailment and landlord-tenant law demonstrate. Just as a bailor who sells property held by a bailee to a third party at no time enjoys possession—constructive or otherwise—so too a gun owner at no point enjoys possession when the government sells guns of his that it possesses to a third party and directs that payment be made to the owner. To say the owner does enjoy constructive possession misunderstands long-established and fundamental notions of property. Alienating the property gives the owner no control over it. It does, in fact, the opposite.

B. The Eleventh Circuit's understanding of possession is also inconsistent with the structure of the statute and several well-accepted canons of statutory interpretation. Other provisions in the same Act distinguish between possessing a gun, on the one hand, and owning, bartering, selling and disposing of it, on the other. In such cases, *expressio unius est exclusio alterius* strongly implies that § 922(g) reaches possession but not selling or owning a gun. Likewise, this Court's anti-surplusage doctrine indicates that possessing does not ordinarily comprehend owning, bartering, or selling. Otherwise, these other terms in the statute would be redundant.

C. Extending possession to transfer of ownership also does nothing to further § 922(g)'s purpose—keeping guns away from those likely to be dangerous. If the government sells for an owner's benefit guns she can no longer possess, it alienates her interest in them

completely. In fact, the Eleventh Circuit's rule has the perverse result of forcing felons to retain a property interest in firearms they wish to be completely rid of.

D. The Eleventh Circuit's broad theory of constructive possession also allows the government to accomplish a forfeiture of noncontraband firearms without providing the owner any process. Since, in this view, § 922(g)'s bar on possession also prohibits any sale or transfer of ownership, it effectively extinguishes all of the owner's interests in his property, rendering it completely without economic value to him. It does so, moreover, without according the owner any of the protections that the Constitution, statutes, and federal rules establish. These include such central requirements as notice, an impartial hearing, an opportunity to argue that the action is excessive under the Eighth Amendment, and a right to a trial by jury.

E. The Eleventh Circuit's interpretation of § 922(g) runs against the constitutional avoidance doctrine. Since it allows the government to extinguish an owner's interests in noncontraband firearms without any reason, it raises serious due process, takings, Fourth Amendment, Second Amendment, and Eighth Amendment concerns—all of which would be avoided by adhering to traditional notions of possession in the common law of property.

II. The Eleventh Circuit's alternative ground for its decision—that commission of a felony gives one "unclean hands" and forever disqualifies someone from seeking equitable relief of any kind—ignores the central requirement of that doctrine: that there be a close relationship between the past wrongdoing and the relief requested. The unclean hands doctrine does not destroy

all of a felon's equitable rights going forward and effectively make him an "outlaw." Taken to its logical conclusion, the Eleventh Circuit's rule would foreclose courts from ever considering a claim for return of property to someone convicted of a crime—even from another private party who stole it.

III. Traditional equitable principles allow the courts to authorize the government to sell or transfer firearms owned by a felon to an appropriate third party. Equity's long-recognized flexibility to fashion appropriate relief allows it to devise mechanisms, like these, that respect the owner's nonpossessory interests in his firearms, ensure that he has no control of them in the future, and avoid burdening the government. Indeed, lower courts have recognized that equity authorizes even transfers to third parties designated by the owner under specific conditions.

ARGUMENT

I. BECAUSE § 922(G) PROHIBITS ONLY POSSESSION, IT DOES NOT BAR THE TRANSFER OR SALE OF FIREARMS TO APPROPRIATE THIRD PARTIES

Section 922(g)'s purpose is to "keep guns out of the hands of those who have demonstrated that they may not be trusted to possess a firearm without becoming a threat to society." *Small* v. *United States*, 544 U.S. 385, 393 (2005) (internal quotation marks omitted). As the Eleventh Circuit recognized, that statute, by its terms, extends only to *possession* of firearms. Pet. App. 4a ("We den[y] Rule 41 relief * * * because of the concern with courts violating 18 U.S.C. § 922(g) by delivering *actual or constructive possession* of firearms to a convicted felon.") (emphasis added); *United States* v. *Howell*, 425 F.3d 971,

977 (11th Cir. 2005) ("Even though the defendant's [idea of a proposed sale] is interesting * * * any firearm *possession, actual or constructive,* by a convicted felon is prohibited by law.") (emphasis added). The court of appeals nonetheless held that a court cannot authorize the government to transfer or sell for the benefit of the convicted owner firearms it holds without him somehow "possessing" the firearms in the process.

The decision of the court of appeals is wrong. It disregards the clear meaning of the key statutory term by confusing "possession" with other incidents of ownership. It also ignores the language of closely related statutory provisions, violates the statute's central purpose, allows the government to effectuate a forfeiture without satisfying any of that procedure's strict substantive or procedural requirements, and raises serious constitutional doubts.

A. "Possession" Has A Clear, Long-Established Meaning Distinct From Other Incidents Of Ownership

If "the statutory text is plain and unambiguous [the court] must apply the statute according to its terms." *Carcieri* v. *Salazar*, 555 U.S. 379, 387 (2009) (citations omitted). This Court has also recognized that when "a federal criminal statute uses a common-law term of established meaning without otherwise defining it, the general practice is to give that term its common-law meaning." *United States* v. *Turley*, 352 U.S. 407, 411 (1957) (citations omitted).

Under the common law, a possessory interest commonly entails "the right to exclude others, by a person who is not necessarily the owner." *Black's Law Dictionary* 1284 (9th ed. 2009); Restatement (First) of

Prop.: Introduction & Freehold Estates § 7 (1936) ("A possessory interest in land exists in a person who has * * * a physical relation to the land of a kind which gives a certain degree of physical control over the land, and an intent so to exercise such control as to exclude other members of society in general from any present occupation of the land."). This understanding accords with the widespread understanding among the courts of appeals that "possession," including constructive possession, entails "dominion and control" over the property in question. See, *e.g.*, *United States* v. *Garrett*, 903 F.2d 1105, 1110 (7th Cir. 1990); *United States* v. *Pelusio*, 725 F.2d 161, 167 (2d Cir. 1983); *United States* v. *Laughman*, 618 F.2d 1067, 1077 (4th Cir. 1980); *United States* v. *Craven*, 478 F.2d. 1329, 1333 (6th Cir. 1973), abrogated on other grounds by *Scarborough* v. *United States*, 431 U.S. 563 (1977); *United States* v. *Virciglio*, 441 F.2d 1295, 1298 (5th Cir. 1971).

The Eleventh Circuit's rule—that the government's sale or transfer of a gun on behalf of an owner who has been convicted of a felony necessarily imputes constructive possession to the owner—violates this well-established understanding. To begin with, the government's transfer to a third party gives the owner no "right to control" or "right to exclude"—the two central indicia of possession. While the firearms are in the government's possession, the government, as bailee, enjoys the complete right to control and to exclude others, including the bailor himself. See John D. Lawson, *The Principles of the American Law of Bailments* § 15, at 34 (1895) ("The bailee not having the title, nevertheless has in addition to the possession of the chattel a special, limited or qualified property in it which gives him a right of action against any one, whether the bailor or a

stranger, interfering with his possession or doing damage to the bailed article.").[3] The convicted owner enjoys neither. He cannot use the firearms, access them, or decide where they are stored, how they are stored, or how they are maintained. Nor can he stop others whom the government permits from handling them.

Under general principles of law, a bailor can sell the property to a third party during the bailment period. See Lawson § 29(9), at 62. When he does, the bailor does not temporarily regain possession in violation of the bailment agreement; throughout the transaction, the bailee retains the same right to control the property and exclude others, including the bailor. *Id.* § 15, at 34. It is black-letter law that a bailment "will not be affected by a sale made by the bailor of his reversionary interest to a third person, for the reason that he can convey no greater interest than he possesses, and has not, during the bailment, a present right of possession." *Id.* § 29(9), at 62; see Philip T. Van Zile, *Elements of the Law of Bailments and Carriers, Including Pledge and Pawn and Innkeepers* § 21 (2d ed. 1908) ("[T]he bailor may, subject to the bailee's rights * * *, sell[,] mortgage[,] or * * * incumber [sic] its right, title, and interest in the property * * * bailed.").

That the convicted owner receives money from the sale (either through the government as intermediary or directly from the new owner) makes no difference to this analysis. His receipt of the proceeds gives him no right

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[3] Once the firearms are transferred to a third party, the original owner can exercise no right to control or right to exclude. Only the new owner can by virtue of her newfound full ownership. She alone, not the original owner, can decide when, how, where, and by whom the firearms can be used. The sale has extinguished the original owner's property interest in them.

to control or right to exclude. The new owner gains these possessory rights and, in any event, she receives possession from the government, not the original owner. Although the sale transfers the possessory rights of control and exclusion from the government to the third party, at no time does the original owner enjoy the power to exercise either. He simply gains no constructive possession.

This conclusion is confirmed by examining another common situation of divided possession and ownership: a standard landlord-tenant lease. In it, the landlord who owns the property grants the right of possession to the tenant for a period of time. The owner no longer enjoys the right to possess and, indeed, the tenant (subject to certain express or implied contractual conditions) can even exclude the owner. Restatement (Second) of Prop.: Land. & Ten. § 1.2 cmt. a (1977). The owner typically retains the right to sell the property subject to the lease. *Id.* § 15.1. But in the process of selling the property then in possession of the tenant, the landowner does not, even temporarily, regain possession in violation of the tenant's rights under the lease. See *id.* § 15.2 cmt. a ("The enjoyment by the tenant of his rights and expectations under the lease usually does not depend significantly on the landlord continuing to own his reversionary interest in the leased property.").

Although the Eleventh Circuit has concluded that transfer or sale to a third party "suggests constructive possession," *Howell*, 425 F.3d at 977 (quoting *United States* v. *Felici*, 208 F.3d 667, 670 (8th Cir. 2000)), it has never explained exactly when (or *how*) the owner would enjoy constructive possession. This is no accident. It cannot articulate the point in the transaction where the convicted owner attains possession *because he never does.*

At no point during the transfer of possession of the firearm from the government to the new owner or the transfer of payment for it to the original owner does the felon control the firearms or have the right to exclude others from using them.

The Eleventh Circuit's notion of constructive possession conflicts with other long-settled views of the common law. Under common-law larceny, for example, "[p]roperty is deemed to remain in the constructive possession of the person who was last in actual possession until he has abandoned it, given it to another person, or until another person has otherwise acquired actual possession." 3 *Wharton's Criminal Law* § 369 at 349 (Charles E. Torcia ed. 1978); see *United States* v. *Sellers*, 670 F.2d 853, 854 (9th Cir. 1982) (per curiam) (same). In a court-ordered sale, in other words, the government as bailee would retain constructive possession of the firearms until the moment they are transferred to the new owner, who then immediately obtains possession. The former owner never enjoys possession—constructive or otherwise.

The Eleventh Circuit's misguided conclusion that such transfer fleetingly provides the convicted owner with constructive possession effectively destroys all his remaining nonpossessory interests in the property. Under this mistaken understanding, a person convicted of a felony cannot exercise his right to sell his property without violating the law's ban on the distinct right of possession. The rule effectively transforms a ban on possession into a ban on alienation and, in so doing, violates both the plain meaning of the statute and foundational principles of property law.

B. The Eleventh Circuit's Expansion Of Possession To Include Nonpossessory Interests Is Inconsistent With The Structure Of The Statute And Multiple Canons Of Statutory Construction

The Eleventh Circuit's bootstrapping of possession into ownership cannot be squared with Congress's careful statutory scheme. As this Court has recognized, possession is just one stick in the "bundle" of property rights, see *United States* v. *Craft*, 535 U.S. 274, 278 (2002), and this Court has distinguished possession, in particular, from the rights to use and dispose of property, see *Andrus* v. *Allard*, 444 U.S. 51, 65-66 (1979) (distinguishing between the right to sell and "the rights to possess and transport * * * property, and to donate or devise it"); see also *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) ("Property rights in a physical thing have been described as the rights to possess, use and dispose of it.") (internal quotation marks omitted).

Congress has observed these distinctions in its regulation of firearms. The Eleventh Circuit's expansive view of possession, however, would overturn all of Congress's careful drafting in a particularly pernicious way. Although Congress adopted the specific language to "possess" in § 922(g), it adopted entirely different and more inclusive language in several closely related provisions *in the very same Act*. And, as this Court has held, when "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (quoting *United States* v. *Wong Kim Bo*, 472 F.2d 720, 722 (5th. Cir. 1972).

Consider § 924(d)(1). This section, like § 922(g), was enacted as part of The Firearm Owner's Protection Act of 1986. See Pub. L. No. 99-308, §§ 102(6), 104(a)(3), 100 Stat. 452, 457. It provides, in relevant part, that when someone has forfeited guns allegedly involved in certain crimes, "upon acquittal of the *owner* or *possessor* * * *, the seized or relinquished firearms or ammunition shall be returned forthwith to the *owner* or *possessor*." 18 U.S.C. § 924(d)(1) (emphasis added). In this provision, Congress—the very same Congress acting at the same time it enacted § 922(g)—carefully distinguished between "owner[s]" and "possessor[s]" and provided that people with each of these different property interests must have their guns returned. It therefore must be "presumed that Congress act[ed] intentionally and purposely in the disparate * * * exclusion," *Russello*, 464 U.S. at 23 (citation omitted), of "owner[s]" from § 922(g)—in other words, that Congress did not intend this provision to extinguish gun owners' nonpossessory interests in their firearms. No good reason exists here for overriding the *Russello* presumption.

Consider as well § 922(j), which appears in the same U.S. Code provision as § 922(g). It makes it "unlawful for any person to receive, *possess*, conceal, store, *barter*, *sell*, or *dispose of* any stolen firearm." 18 U.S.C. § 922(j) (emphasis added). By distinguishing between possessing a firearm, and "barter[ing], sell[ing], or dispos[ing] of" it, Congress clearly indicated that a prohibition on possessing a firearm does not itself forbid disposing of it; by the same token, § 922(g)'s prohibition on "possession" of a firearm by a felon does not include nonpossessory incidents of ownership. Again, the exclusion of these terms from § 922(g) must be "presumed * * * intentional[] and purpose[ful]," *Russello*, 464 U.S. at 23,

under the doctrine of "*[e]xpressio unius est exclusio alterius*," *Leatherman* v. *Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993).

Congress has also expressly distinguished between possession and ownership in a number of other closely related provisions. Section 931(a), for example, makes it unlawful for a convicted felon "to purchase, *own*, or *possess* body armor," 18 U.S.C. § 931(a) (emphasis added); § 229(a)(1) makes it a crime to, among other things, "*own*, *possess*, or use * * * any chemical weapon," *id.* § 229(a)(1) (emphasis added); and § 229B(a) likewise provides that any person convicted under § 229A(a) must "forfeit * * * any property, real or personal, *owned*, *possessed*, or used by a person involved in th[at] offense," *id.* § 229B(a) (emphasis added). Each of these provisions specifically distinguishes between ownership and possession and includes both terms. Section 922(g) includes only the latter. Here too *expressio unius est exclusio alterius* indicates that § 922(g), unlike these other provisions, does not bar other rights of ownership but only possession.

The broad interpretation of "possession" embraced by the Eleventh Circuit would, moreover, render superfluous all the other terms Congress included in these other provisions, thereby violating yet another "cardinal principle of statutory construction," *Williams* v. *Taylor*, 529 U.S. 362, 404 (2000), that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant," *Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004) (quoting 2A Norman J. Singer, *Statutes and Statutory Construction* § 46.06, at 181-186 (rev. 6th ed. 2000)). "As [this Court] ha[s long] noted * * *, we are hesitant to

adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law." *Mackey* v. *Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988).

Clearly, Congress understands the difference between ownership and possession and has used each term deliberately with its specific meaning in mind. Congress's decision in drafting § 922(g) to bar possession but not ownership, transfer, or sale means it intended to bar the one and not the others. "[C]ourts must presume that [the] legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992).

This is particularly true when, as the government itself has previously argued, "Congress crafted the * * * forerunner to Section 922(g)" with "detailed precision," U.S. Br. at 13, *Small* v. *United States*, 544 U.S. 385 (2005) (No. 03-750) (citing *Barrett* v. *United States*, 423 U.S. 212, 216-217 (1976)), and this Court has held that "Congress knew the significance and meaning of the language it employed" in § 922(g), *Barrett*, 423 U.S. at 217. In fact, this Court has noted, "[i]t is obvious" that the language employed "throughout * * * [was] chosen with care" and that the provisions represent "a carefully constructed package of gun control legislation." *Scarborough* v. *United States*, 431 U.S. 563, 570 (1977). Thus, Congress's bar of only possession must "mean[ ] exactly what it says," *Barrett*, 423 U.S. at 216 (quotation marks and citation omitted), and no more.

C. The Eleventh Circuit's Rule Turns § 922(g)'s Purpose On Its Head

Prohibiting those convicted of a felony from selling their firearms to third parties does nothing to advance

the recognized purpose of § 922(g). In enacting § 922(g), Congress sought to "keep guns out of the hands of those who have demonstrated that they may not be trusted to possess a firearm without becoming a threat to society." *Small* v. *United States*, 544 U.S. 385, 393 (2005) (internal quotation marks omitted); *Dickerson* v. *New Banner Inst., Inc.*, 460 U.S. 103, 112 (1983) (same). As this Court has noted, "keeping firearms out of the hands of those not legally entitled to possess them" was "[t]he principal purpose of the federal gun control legislation." *Huddleston* v. *United States*, 415 U.S. 814, 824 (1974) (internal quotation marks omitted).

The legislative history of § 922(g) and its predecessor makes clear that this purpose extended only to possession, not to ownership. That history not only speaks repeatedly of barring felons from possessing firearms, see, *e.g.*, 114 Cong. Rec. 13,868 (1968) (statement of Sen. Long) ("anybody who has been convicted of a felony * * * is not permitted to *possess* a firearm") (emphasis added); *id.* at 13,869 ("this simply strikes at the *possession* of firearms") (emphasis added); *ibid.* ("It places the burden and the punishment on the kind of people who have no business *possessing* firearms in the event they come into *possession* of them.") (emphasis added), but it also specifically contemplates allowing felons to own them.

In fact, the colloquy between the original sponsor, Senator Long, and Senator McClellan could not more clearly establish Congress's intent to extinguish only a felon's possessory interests in his firearms:

> Mr. McClellan. I have not had an opportunity to study the amendment. * * * The thought that occurred to me, as the Senator explained it, is that if a man had been in the penitentiary, had been a felon,

> and had been pardoned, without any condition in his pardon to which the able Senator referred, granting him the right to bear arms, could that man own a shotgun for the purpose of hunting?
>
> Mr. Long of Louisiana. No, he could not. He could own it, but he could not possess it.
>
> Mr. McClellan. I beg the Senator's pardon?
>
> Mr. Long of Louisiana. This amendment does not seek to do anything about who owns a firearm. He could not carry it around; he could not have it.

114 Cong. Rec. 14,774 (1968).

The government's view does nothing to promote the statute's purpose. Allowing felons to transfer their non-possessory interests to lawful purchasers poses no risk of putting firearms back in felons' hands. It merely allows those who own guns to dispose of their remaining property interests in them.

The government's view, in fact, turns the statute's purpose on its head. The government would bar a person convicted of a felony from *completely* alienating his interests in firearms he owns but does not possess, thereby forcing him to *retain* property rights in firearms he would like to be rid of. Nothing suggests Congress intended such a perverse result.

D. The Eleventh Circuit's Broad Theory Of Possession Allows The Government To Effectively Accomplish A Forfeiture Of Non-contraband Property Without Providing Any Process

The Eleventh Circuit's rule is erroneous for yet another reason: It allows the government to effectively extinguish all of an owner's interests in his property

without having to satisfy any of the strict substantive and procedural requirements for forfeiture. No one disputes that, by receiving the firearms from petitioner in accordance with the magistrate judge's request, the government acquired no ownership interest in petitioner's firearms. See Pet. App. 13a-14a & n.6. But the Eleventh Circuit's rule not only prevents a felon from *possessing* firearms, it also prevents him for all time from lawfully realizing the value of their sale. That effectively extinguishes all of the person's interests in his lawful property, rendering the property utterly without economic value to him.

It does so, moreover, without observing any of the requirements the Constitution, statutes, and federal rules establish for forfeiture. These requirements are not trivial. Rather, they "make federal civil forfeiture procedures fair to property owners and * * * give * * * [them] the means to recover their property and make themselves whole" after government seizures. H.R. Rep. No. 192, 106th Cong., 1st Sess. 11 (1999). In particular, the Eleventh Circuit's rule allows the government to dispense with giving notice and a hearing, as due process ordinarily requires, *United States* v. *James Daniel Good Real Prop.*, 510 U.S. 43, 48, 59 (1993), and denies the owner any opportunity to argue that the deprivation of all his ownership interests is excessive under the Eighth Amendment, see *Austin* v. *United States*, 509 U.S. 602 (1993). Nor is the government required to identify a statutory basis and "sufficiently detailed facts" to support its claim, Fed. R. Civ. P. Supp. G(2), show that the guns have some connection to a criminal act, see 18 U.S.C. § 924(d)(1), or prove that they were purchased with criminal proceeds, *id.* § 981(a)(1). It can, in fact, accomplish the equivalent

of forfeiture without satisfying § 924(d)(1)'s strict 120-day statute of limitations. *Id.* § 924(d)(1); see *Miller*, 588 F.3d at 419 (noting that government's view "nullifies the statute of limitations"). And, needless to say, the government can avoid the jury trial the rules make available. See Fed. R. Civ. P. Supp. G(9). Even when these strict procedural and substantive requirements are met, "[f]orfeitures are not favored; they should be enforced only when within both letter and spirit of the law." *United States* v. *One 1936 Model Ford V-8 De Luxe Coach, Motor No. 18-3306511*, 307 U.S. 219, 226 (1939). The Eleventh Circuit rule violates both.

The Eleventh Circuit's rule permits "increasing and virtually unchecked use of * * * civil forfeiture * * * and * * * disregard for due process that is [embedded] in th[e] statutes" that ordinarily govern it. *United States* v. *All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896, 905 (2d Cir. 1992). Since due process is "conferred, not by legislative grace, but by constitutional guarantee," *Arnett* v. *Kennedy*, 416 U.S. 134, 167 (1974) (opinion of Powell, J.), courts must prevent forfeiture from "becom[ing] more like a roulette wheel employed * * * [as] a tool wielded to punish * * * than a component of a system of justice," *Bennis* v. *Michigan*, 516 U.S. 442, 456 (1996) (Thomas, J., concurring). The court of appeals' interpretation "would permit the [government] to exercise virtually unbridled power to confiscate vast amounts of property," *id.* at 458 (Stevens, J., dissenting), running afoul of the safeguards in place to protect individuals' property rights.

Allowing the government to avoid the constitutional, statutory, and other protections that attach to forfeiture would permit arbitrary encroachment on an individual's lawful ability to rent, sell, or otherwise transfer property.

See *James Daniel Good Real Prop.*, 510 U.S. at 54 ("The seizure deprived Good of valuable rights of ownership, including the right of sale * * * and the right to receive rents."); *Fuentes* v. *Shevin*, 407 U.S. 67, 80-81 (1972) ("The purpose of [prior notice and hearing] is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property."). Forfeiture requirements "ensure the requisite neutrality that must inform all government decisionmaking" and prevent the government from unilaterally extinguishing the "[i]ndividual freedom [that] finds tangible expression in property rights." *James Daniel Good Real Prop.*, 510 U.S. at 55, 61.

Petitioner received none of these procedural protections in this case. The magistrate judge ordered Mr. Henderson to turn his firearms over to the government as a condition of bond. J.A. 28, 30. The government never contended that the guns were used in the commission of any crime or that the guns were subject to forfeiture under 21 U.S.C. § 853. The government, in fact, never commenced civil forfeiture proceedings. Rather, petitioner's property interests were effectively extinguished without *any* process whatsoever. The government applied none of the procedural or substantive requirements that ordinarily ensure the fairness of forfeiture. It simply took delivery of his guns and kept them.

E. The Eleventh Circuit's View Of Possession Must Be Rejected Because It Raises Serious Constitutional Doubts

1. The Eleventh Circuit's understanding of the felon-in-possession statute is utterly implausible. But even if it

were not, this Court has long held that "when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court." *Clark* v. *Martinez*, 543 U.S. 371, 380-381 (2005). If forfeiture proceedings implicate the Due Process Clause of the Fifth Amendment, see, *e.g.*, *United States* v. *$8,850 in U.S. Currency*, 461 U.S. 555 (1983), retaining noncontraband property without any process at all implicates due process concerns *a fortiori*, see, *e.g.*, *Cooper* v. *City of Greenwood*, 904 F.2d 302, 304 (5th Cir. 1990). When "the [g]overnment seize[s] property not to preserve evidence of wrongdoing, but to assert * * * control over the property itself, [it] must comply with the Due Process Claus[e]." *James Daniel Good Real Prop.*, 510 U.S. at 52.

The rights that petitioner has been deprived of—for example, the right to transfer his property and to realize its economic value—are rights traditionally protected by due process. See *James Daniel Good Real Prop.*, 510 U.S. at 54-55 (holding that right merely to receive rent must receive due process protection). The Eleventh Circuit's rule flouts the rationale for "the prohibition against the deprivation of property without due process of law": "[t]he high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference," *Fuentes*, 407 U.S. at 81, and recognition that "[i]ndividual freedom finds tangible expression in property rights," *James Daniel Good Real Prop.*, 510 U.S. at 61. The government's continued retention of Mr. Henderson's

gun collection permanently and unnecessarily dispossesses him of *all* his rights in it.

Petitioner's right "to be free from governmental interference[ ] is [by itself] a private interest of historic and continuing importance." *James Daniel Good Real Prop.*, 510 U.S. at 53-54. The particular property interests that he was deprived of, however, are substantial. The government appraised his collection at $3,570.92. See *supra*, p. 5 & n.2. More generally, gun collections routinely attain values of thousands, if not tens of thousands, of dollars. *E.g.*, Larry Fitzpatrick, *No Heirs Found for Springfield Man Who Died Leaving Valuable Gun Collection*, Or. Herald, May 11, 2012, *available at* http://goo.gl/huSCek (reporting "a gun collection worth about half a million dollars").[4]

These property deprivations, moreover, are not rare occurrences. There were more than 1,200,000 felony convictions in 2006. U.S. Dep't of Justice, Bureau of Justice Statistics, *Felony Sentences in State Courts, 2006—Statistical Tables*, tbl. 1.1; U.S. Dep't of Justice, Bureau of Justice Statistics, *Federal Justice Statistics 2006 Statistical Tables*, tbl. 4.2. Were the Court to approve the Eleventh Circuit's rule, every firearms

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[4] The cases involved in the circuit split reflect this fact. In one case, the Government sold the firearm collection for over $30,000, see *Cooper*, 904 F.2d at 304, and, in another, [illegible]d a collection valued at over $100,000, see *United States* v. *Zaleski*, 686 F.3d 90, 91 (2d Cir. 2012). And sizable collections were present in many of the other cases involved in the split. *E.g.*, *Miller*, 588 F.3d at 418 (34 firearms); *United States* v. *Roberts*, 322 F. App'x 175, 176 (3rd Cir. 2009) (10 firearms); *United States* v. *Headley*, 50 F. App'x 266, 267 (6th Cir. 2002) (14 firearms); Notice and Motion for Ct. Order to Return Personal Property at 4, *United States* v. *Brown*, No. 1:06-cr-00071-SM (D.N.H. Oct. 16, 2006), ECF No. 65 (30 firearms).

owner convicted of a felony would be prevented from realizing any value from legally-acquired property that may be that person's most valuable asset. See, *e.g.*, *Zaleski*, 686 F.3d at 91 (valuing a felon's legal firearm collection at over $100,000). In any event, firearms represent significant household assets. One commenter estimates the cost of a handgun—one of the least expensive types of firearms—with associated ammunition and equipment at $ 714. Dan Zimmerman, *The True Cost of Buying a Handgun*, The Truth About Guns.com (Oct. 20, 2013), http://goo.gl/vzrcV8. That sum represents two-thirds of the typical American household's monthly discretionary income.[5] Furthermore, many individuals purchase firearms as an investment, believing that "firearms [never] do anything but increase in value." Joe Mont, *Investing in Guns Beats Tech Stocks*, The Street (Apr. 13, 2011), http://goo.gl/MIQyID. And those who own firearms tend to own several. Allison Brennan, *Analysis: Fewer U.S. Gun Owners Own More Guns*, CNN (July 31, 2012), http://www.thestreet.com/story/11080515/1/investing-in-guns-beats-tech-stocks.html.

The Eleventh Circuit's approach also conflicts with this nation's long recognition of citizens' economic interest in firearms. Even during the Revolution, when the Continental Congress authorized the seizure of weapons held by Loyalists, it required that "the arms when taken be appraised by indifferent persons, and such as are applied to the arming the continental troops, be paid for by Congress, and the residue by the respective assemblies, conventions, or councils, or committees of

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[5] The typical American household has $12,800 in annual discretionary spending. Experian, *The 2011 Discretionary Spend Report* 3 (2011).

safety." 4 *Journals of the Continental Congress, 1774–1789*, at 201-205 (Worthington Chauncey Ford ed., Gov't Printing Office 1906). Contemporaneous state law likewise required compensation for arms taken from private persons. See, *e.g.*, An Act for Providing Against Invasions and Insurrections, 1777 Va. Acts ch. VII, *reprinted in* 9 *Hening's Statutes at Large* 291, 293-294 (1821) (directing that any arms taken for temporary state use and lost or damaged be paid for). Firearms were an important asset in Founding-era America. An examination of a national database of probate inventories from 1774 showed that there were more colonial American estates listing guns than estates listing bibles or coins or other money. James Lindgren, *Fall from Grace: Arming America and the Bellesiles Scandal*, 111 Yale L.J. 2195, 2208-2209 (2002).

2. The Eleventh Circuit's rule raises other constitutional concerns as well. The Fifth Amendment's Takings Clause "stand[s] directly in opposition to state action intended to deprive people of their legally protected property interests." *Hudson* v. *Palmer*, 468 U.S. 517, 539 (1984) (O'Connor, J., concurring). "The protections of the Takings Clause apply to * * * personal property," like a gun collection. *Huntleigh USA Corp.* v. *United States*, 525 F.3d 1370, 1377-1378 (Fed. Cir. 2008) (citing *Andrus* v. *Allard*, 444 U.S. 51, 65 (1979)). The courts have, therefore, recognized that when the government "effect[s] a *de facto* forfeiture by retaining the property seized indefinitely" its "continued retention * * * constitute[s] a taking without just compensation." *United States* v. *Premises Known as 608 Taylor Ave., Apartment 302, Pittsburgh, Pa.*, 584 F.2d 1297, 1302 (3d Cir. 1978); accord *State* v. *Fadness*, 268 P.3d 17, 29 (Mont. 2012) (same); *Lee* v. *City of Chicago*, 330 F.3d 456,

466 & n.5 (7th Cir. 2003) (same); see also *Andrus*, 444 U.S. at 65-66 (suggesting that the "denial" of the full "bundle" of property rights constitutes a taking). The Eleventh Circuit's rule, however, allows the government to effectively extinguish every one of Mr. Henderson's property interests in his firearms without providing any compensation whatsoever. "[A] State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law." *Phillips* v. *Washington Legal Found.*, 524 U.S. 156, 167 (1998). The federal government likewise should not be able to sidestep the Takings Clause by rejecting a long-held distinction between possessory and nonpossessory property interests.

3. Furthermore, a continued holding of property may "constitute * * * a seizure [in addition to] a taking," raising Fourth Amendment concerns as well. *Presley* v. *City of Charlottesville*, 464 F.3d 480, 485 (4th Cir. 2006). When the government refuses to return property without legal justification, the aggrieved party will often be able to "prove that the government [is] *unreasonably* seiz[ing] property." *Ibid.* (emphasis in original). While the government may seize property for use in a criminal proceeding, it "cannot legally retain property indefinitely." *Mendez* v. *United States*, No. 1:99-cv-03496-JFK, 2003 WL 21673616, at *4 (S.D.N.Y. July 16, 2003). And if the government cannot offer a legal justification for continuing to retain property, "such retention would violate [the property owner]'s Fourth Amendment rights." *Ibid.*

4. The government's broad understanding of "possession" unnecessarily raises Second Amendment concerns by burdening those who fear the government may accuse them of a crime. Under the government's

theory of possession, a firearm owner that feels she may be charged with a felony has three bad options: voluntarily deliver her firearms to the government at her bond hearing and forfeit them without receiving any compensation in the event of conviction; sell or give away the firearms before she has even been accused, receiving compensation but leaving her unable to protect herself or her family; or keep the firearms, thus probably making bond impossible, and face possible liability under § 922(g) upon conviction. Even if she were to pawn her firearms and thus place them outside her possession and control, she would, under the government's view, automatically violate § 922(g) the moment she was adjudged guilty of the charged felony. See *United States* v. *Casterline*, 103 F.3d 76, 79 (9th Cir. 1996) ("If ownership were equated with possession, then one charged with a first felony, who had pawned his guns or otherwise put them out of his possession and control, but retained title, would automatically commit a second felony the moment he was adjudged guilty."). In other words, the government's preferred (and facially implausible) rule seriously harms a gun owner even before she is formally accused of a crime and even if she is eventually acquitted.

This burdening is inconsistent with the Second Amendment. The right to keep and bear arms for self-defense has been a fundamental right since the time of this country's founding. *McDonald* v. *City of Chicago*, 561 U.S. 742, 767-769 (2010). While it is presumptively permissible to prohibit those who have been convicted of felonies from possessing guns, *District of Columbia* v. *Heller*, 554 U.S. 570, 626-627 (2008), the Eleventh Circuit's reliance on § 922(g) to effectively proscribe owners from completely alienating their firearms after conviction unnecessarily burdens their right to protect

themselves. Any suggestion that Mr. Henderson could have avoided this dilemma by selling his firearms prior to being formally accused is no answer. Forcing that choice chills "the inherent right of self-defense [that] has been central to the Second Amendment." *Id.* at 628.

6. Finally, the Eleventh Circuit's rule raises grave concerns under the Excessive Fines Clause. That Clause "limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense." *Austin* v. *United States*, 509 U.S. 602, 609-610 (1993) (internal emphasis and quotation marks omitted). And, this Court has held, "[a] forfeiture that reaches [property not actually used to commit an offense] is *ipso facto* punitive and therefore subject to review under the Excessive Fines Clause." *United States* v. *Bajakajian*, 524 U.S. 321, 333 n.8 (1998). Yet, by bootstrapping § 922(g)'s ban on possession into a ban on ownership, the Eleventh Circuit circumvents the "principle of proportionality," the "touchstone of the constitutional inquiry under the Excessive Fines Clause." *Id.* at 334. It imposes an additional fine on the gun owner by depriving her of the complete economic value of her firearms—no matter how great their value and how serious the felony. The Eleventh Circuit's rule places no limit whatsoever on the government's power to extract property as *de facto* punishment for an offense.

II. THE ELEVENTH CIRCUIT WRONGLY APPLIED THE DOCTRINE OF UNCLEAN HANDS

The Eleventh Circuit's alternative holding—that, as someone convicted of a felony, petitioner had "unclean hands" and was thus disqualified from seeking any equitable relief, see Pet. App. 4a—fares even worse

under scrutiny. Such a rule would bar anyone ever convicted of a crime from seeking equitable relief in *any suit* no matter how unrelated to the initial conviction.

This Court has squarely held that the unclean hands doctrine applies "only where some unconscionable act of one coming for relief has *immediate and necessary relation to the equity that he seeks in respect of the matter in litigation.*" *Keystone Driller Co.* v. *Gen. Excavator Co.*, 290 U.S. 240, 245 (1933) (emphasis added); see also 1 Joseph Story & W.H. Lyon, *Commentaries on Equity* § 100, at 101 (14th ed. 1918); 2 John Norton Pomeroy, *A Treatise on Equity Jurisprudence* § 399, at 94-95 (Spencer W. Symons ed., 5th ed. 1941). This strict relational requirement has been a maxim of the doctrine since its inception in English law. See Zechariah Chafee, Jr., *Coming Into Equity With Clean Hands*, 47 Mich. L. Rev. 877, 880-882 (1949). Indeed, in the very first case to use the phrase "unclean hands," *Dering* v. *Earl of Winchelsea*, the Court of Exchequer explained, "a man must come into a Court of Equity with clean hands; but when this is said it does not refer to a general depravity; it must have an *immediate and necessary relation* to the equity sued for." (1787) 29 Eng. Rep. 1184 (Exch.) 1185; 1 Cox. Eq. Cas. 318, 319 (emphasis added). Thus, "illegality" cannot constitute a defense "when merely collateral to the cause of action sued on." *Loughran* v. *Loughran*, 292 U.S. 216, 228 (1934).

Because it requires a close relationship between past wrongdoing and the relief requested, the doctrine of unclean hands "does not go so far as to prohibit a court of equity from giving its aid to a bad or a faithless man or a criminal." 2 Pomeroy § 399, at 97. Thus, "[e]quity does not demand that its suitors shall have led blameless lives." *Loughran*, 292 U.S. at 229; see also *Precision*

Instrument Mfg. Co. v. *Auto. Maint. Mach. Co.*, 324 U.S. 806, 814-815 (1945) (affirming *Loughran*). The doctrine of unclean hands "is not a license to destroy the rights of persons whose conduct is unethical." Dan B. Dobbs, *Handbook on the Law of Remedies* § 2.4, at 46 (1973). "[C]ourts of equity," in short, "do not make the quality of suitors the test." *Keystone Driller*, 290 U.S. at 245; see also Dobbs § 2.4 at 46 (explaining that under unclean hands, "unrelated bad conduct is not to be considered against the plaintiff"); Henry L. McClintock, *Handbook of the Principles of Equity* § 26 at 63 (1948) ("[I]nequitable conduct which will defeat plaintiff's recovery must * * * refer[] to the transaction on which he bases his suit; relief will not be refused merely because of plaintiff's general bad character.").

No other court of appeals has endorsed the Eleventh Circuit's radical expansion of the unclean hands doctrine and most have implicitly rejected it. See Pet. 14-16. While courts occasionally use the language of unclean hands to deny Rule 41(g) or other equitable relief to persons convicted of crimes, they do so only when they seek the return of derivative contraband related to the offense. See, *e.g.*, *United States* v. *Kaczynski*, 551 F.3d 1120, 1129–1130 (9th Cir. 2009). Denying relief in such cases can be appropriate, because the actor's past criminal conduct "has [an] immediate and necessary relation to the equity that he seeks in respect of the matter in litigation." *Keystone Driller*, 290 U.S. at 245.

No such connection exists here. It is undisputed that the firearms at issue are not derivative contraband. Petitioner did not use a firearm—much less his entire collection of firearms—in committing the drug distribution offense to which he pleaded guilty. See Pet. App. 4a ("[petitioner] did not use those firearms in

furtherance of his offense"); *id.* at 13a-14a (finding that firearms were not "contraband"). Nor is there any evidence that he used any proceeds from marijuana sales to purchase them. *Ibid.* (same). The Eleventh Circuit based its holding of unclean hands solely on petitioner's status as a felon, *id.* at 4a, directly violating "[t]he general rule * * * that seized property, other than contraband, should be returned to its rightful owner once * * * criminal proceedings have terminated." *Cooper*, 904 F.2d at 304.

Taken to its logical conclusion, the Eleventh Circuit's rule would foreclose courts from *ever* considering a claim for return of property to a rightful owner convicted of a crime. The government could seize or hold property belonging to a person convicted of an offense knowing that he would have no status to invoke the courts' equitable powers to return it. It could thus impose upon a felon or even a misdemeanant an additional punishment beyond that imposed by law. More broadly, the Eleventh Circuit's rule could call into question the well-established principles of equity that shape the contours of many actions, particularly habeas corpus. See, *e.g.*, *McCleskey* v. *Zant*, 499 U.S. 467, 493 (1991) (explaining that habeas doctrines "invoke equitable principles to define the court's discretion to excuse pleading and procedural requirements"); Erica Hashimoto, *Reclaiming the Equitable Heritage of Habeas*, 108 Nw. U. L. Rev. 139, 142 (2013) (arguing that current doctrine "has obscured the importance of habeas's equitable roots").

Indeed, the logic of the Eleventh Circuit's rule would bar anyone convicted of a crime from ever invoking equity—as in a simple claim for conversion—even against private individuals. That would heap ever-increasing, heavy penalties upon those convicted, make them

defenseless against the world, and be tantamount to "outlawry"—a practice this Court has long condemned and rejected. *Ullmann* v. *United States*, 350 U.S. 422, 451 n.5 (1956) (Douglas, J., dissenting) ("The [Constitution] place[s] beyond the pale the imposition of infamy or outlawry."). "[A] person does not," this Court has held, "become an outlaw and lose all rights by doing an illegal act." *Nat'l Bank & Loan Co.* v. *Petrie*, 189 U.S. 423, 425 (1903).

Tellingly, this Court has held that claimants cannot be foreclosed from litigating their rights to property when the asserted bar rests on far more compelling claims of misconduct, including rebellion against the United States. See *Degen* v. *United States*, 517 U.S. 820, 828 (1996) (citing *McVeigh* v. *United States*, 78 U.S. (11 Wall.) 259, 267 (1870)). As this Court noted there, foreclosing a person from litigating his rights to property because of misconduct unrelated to the property is "an arbitrary response to the conduct it is supposed to * * * discourage." *Ibid.*

The Eleventh Circuit's narrow application of its "unclean hands" rule reflects an appreciation of its flaws. That court has applied the rule in only two cases—*United States* v. *Howell*, 425 F.3d 971, 974 (11th Cir. 2005), and this case, Pet. App. 4a—both of which involve non-contraband firearms. It has never applied the rule more broadly. Indeed, it routinely *allows* felons to invoke Rule 41(g) in seeking the return of other types of noncontraband property from the government. See, *e.g.*, *United States* v. *Melquiades*, 394 F. App'x 578, 579-580 (11th Cir. 2010). The Eleventh Circuit's unprincipled approach reflects little faith in the validity of its own rule.

III. RULE 41(G) AND EQUITY BOTH PERMIT THE COURTS TO ORDER THE TRANSFER OR SALE OF FIREARMS TO AN APPROPRIATE THIRD PARTY

Rule 41(g) is built upon the equitable principle that "all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction." *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946). The Advisory Committee that proposed the 1989 Amendment to the rule expressly stated that "[n]o standard is set forth in the rule to govern the determination of whether property should be returned to a person aggrieved either by an unlawful seizure or by deprivation of the property" and "reasonableness under all of the circumstances must be the test when a person seeks to obtain the return of property." Fed. R. Crim. P. 41(g) advisory committee's note to the 1989 amendment. As this Court has previously held, without a "necessary and inescapable inference * * * restrict[ing] the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter*, 328 U.S. at 398. In order for equity to be "made on a case-by-case basis," *Holland* v. *Florida*, 560 U.S. 631, 649-650 (2010), courts can fashion *any* appropriate relief that comports with traditional equitable principles so long as there is no clear congressional command excluding it, *Porter*, 328 U.S. at 398; see also *Hunsucker* v. *Phinney*, 497 F.2d 29, 34 (5th Cir. 1974) ("Rule 41 is a crystallization of a principle of equity jurisdiction. That equity jurisdiction persists as to situations not specifically covered by the Rule.") (internal quotation marks omitted). Such "flexibility [is] inherent in equitable procedure [in order to] enable[e] courts to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct par-

ticular injustices." *Holland*, 560 U.S. at 650 (internal quotation marks omitted and final alteration in original). By allowing district courts to fashion appropriate transfer mechanisms for the disposition of property owned by a defendant who is legally prohibited from *possessing* such property, courts can flexibly achieve "complete rather than truncated justice" through Rule 41(g). *Porter*, 328 U.S. at 398.

In order to honor the flexibility intended by Rule 41(g) and equity generally and to fashion appropriate relief, courts should not be confined to the constricting choices of either returning the firearms to the defendant—prohibited by § 922(g)—or destroying the firearms—a decision contrary to the equitable principle that courts must "impose the least drastic remedy available to achieve the desired goals," *Lawton* v. *Nyman*, 327 F.3d 30, 46 (1st Cir. 2003). Instead of being confined to these two choices, a court may and should "reach into its equitable tool-box to devise an alternate, less drastic [form of] relief tailored to the necessities and facts" of the case. *United States* v. *Rodriguez*, No. EP-08-CR-1865-PRM, 2011 WL 5854369, at *14 (W.D. Tex. Feb. 18, 2011). Courts that have done so have approved a variety of equitable remedies that would protect the property interests of the gun owner, ensure that he has no control over the firearms, and avoid burdening the government.

One mechanism courts have approved allows the government or a private party to sell the firearms for the benefit of the defendant. See *Cooper* v. *City of Greenwood*, 904 F.2d 302, 306 (5th Cir. 1990) ("We see no reason that a court * * * could not order a sale for the account of a claimant who * * * legally could not possess the firearms, were forfeiture to be denied for any

reason."); see also *United States* v. *Approximately 627 Firearms, More or Less*, 589 F. Supp. 2d 1129, 1140 (S.D. Iowa 2008) (holding that a court is "not prohibited from ordering the sale of [defendant's] personal firearms and the distribution of the proceeds to him"). The Second Circuit also approved this mechanism in *United States* v. *Zaleski*, when it allowed the owner's firearms to be transferred to a federally licensed gun dealer, who could then sell the weapons and transfer the proceeds to the defendant. 686 F.3d 90, 92 (2d Cir. 2012). The Second Circuit found that this third-party transfer and sale upheld the equitable principles of Rule 41(g) while not attaching constructive possession to the original owner in violation of § 922(g). *Id.* at 91, 93.

Transferring the firearms to a person of the defendant's choosing is also permissible so long as the transferee cannot be controlled or influenced by the defendant. See *United States* v. *Miller*, 588 F.3d 418, 420 (7th Cir. 2009) (approving "gift of the firearms to [third parties]" but allowing the court to "conditio[n]" transfer "on the recipient's written acknowledgement that returning the guns to [the original owner] or honoring his instructions would aid and abet [his] unlawful possession * * * and thus subject the recipient to criminal prosecution"); *United States* v. *Parsons*, 472 F. Supp. 2d 1169, 1175 (N.D. Iowa 2007) (allowing defendant to designate a third party to receive his weapons upon the third party's statement that he would sell a portion of the weapons and keep the remainder but never let the defendant see or possess them).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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RESPONDENT'S BRIEF

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No. 13-1487

In the Supreme Court of the United States

TONY HENDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, following a felony conviction that makes it unlawful to possess firearms under 18 U.S.C. 922(g)(1), a defendant is entitled under Federal Rule of Criminal Procedure 41(g) or general equity principles to have non-contraband firearms that were held by the government during the criminal proceedings transferred to his wife or to his friend.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory provisions involved 2
Statement 2
Summary of argument 11
Argument:
I. Rule 41(g) does not contemplate a transfer of property to a third party 14
II. If petitioner's motion is considered as a more general motion invoking the district court's civil equitable jurisdiction, the district court acted within its discretion when it denied the motion 16
A. Convicted felons may not actually or constructively possess firearms 17
B. It is possible for a convicted felon to transfer his ownership interest in firearms without violating Section 922(g)(1)'s ban on possession ... 19
C. The court of appeals did not hold that Section 922(g)(1) extinguishes a convicted felon's ownership interest in firearms 28
D. The district court was not required to grant petitioner's request that his firearms be transferred to his wife or to Rosier 34
Conclusion 39
Appendix — Statutory and regulatory provisions 1a

TABLE OF AUTHORITIES

Cases:

Cooper v. *City of Greenwood*, 904 F.2d 302 (5th Cir. 1990) 17, 22
Ordonez v. *United States*, 680 F.3d 1135 (9th Cir. 2012) 15

Cases—Continued: Page

Quackenbush v. *Allstate Ins. Co.*, 517 U.S. 706 (1996) 16, 34
Sash v. *United States*, No. 09 Civ. 450 (DC) 2009 WL 3007379 (S.D.N.Y. Sept. 22, 2009) 31
Small v. *United States*, 544 U.S. 385 (2005) 25
State v. *Fadness*, 268 P.3d 17 (Mont. 2012) 38
United States v. *Alanis*, 265 F.3d 576 (7th Cir. 2001), cert. denied, 535 U.S. 1095 (2002) 36
United States v. *Al-Rekabi*, 454 F.3d 1113 (10th Cir. 2006) 19, 26
United States v. *Benjamin*, 711 F.3d 371 (3d Cir.), cert. denied, 134 S. Ct. 309 (2013) 18, 19
United States v. *Bryant*, 523 F.3d 349 (D.C. Cir. 2008) 18, 19
United States v. *Clymore*, 245 F.3d 1195 (10th Cir. 2001) 31
United States v. *Davis*, 449 F.3d 842 (8th Cir. 2006) 18
United States v. *Dhinsa*, 243 F.3d 635 (2d Cir.), cert. denied, 534 U.S. 897 (2001) 19
United States v. *Eubanks*, 169 F.3d 672 (11th Cir. 1999) 17, 35, 38
United States v. *Farmer*, 770 F.3d 1363 (10th Cir. 2014) 18, 19
United States v. *Felici*, 208 F.3d 667 (8th Cir. 2000), cert. denied, 531 U.S. 1201 (2001) 9, 31
United States v. *Gardner*, 488 F.3d 700 (6th Cir. 2007) 18, 19
United States v. *Gunn*, 369 F.3d 1229 (11th Cir.), cert. denied, 543 U.S. 937 (2004) 18, 19
United States v. *Hood*, 507 Fed. Appx. 859 (11th Cir. 2013) 25

Cases—Continued: Page

United States v. *Howell*, 425 F.3d 971 (11th Cir. 2005) ..... *passim*
United States v. *McKnight*, 953 F.2d 898 (5th Cir.), cert. denied, 504 U.S. 989 (1992) 19
United States v. *Meza*, 701 F.3d 411 (5th Cir. 2012) 18
United States v. *Miller*, 588 F.3d 418 (7th Cir. 2009) ..... *passim*
United States v. *Mochado*, 465 F.3d 1301 (11th Cir. 2006), abrogation on other grounds recognized by *United States* v. *Lopez*, 562 F.3d 1309 (11th Cir. 2009) 17, 35
United States v. *Nungaray*, 697 F.3d 1114 (9th Cir. 2012) 25, 26
United States v. *Payton*, 159 F.3d 49 (2d Cir. 1998) 18
United States v. *Reed*, 636 F.3d 966 (8th Cir. 2011) 19
United States v. *Ridolfi*, 768 F.3d 57 (1st Cir. 2014) 18, 19
United States v. *Schmitt*, 770 F.3d 524 (7th Cir. 2014) 18
United States v. *Scott*, 424 F.3d 431 (4th Cir.), cert. denied, 546 U.S. 1051 (2005) 18
United States v. *Shigemura*, 664 F.3d 310 (10th Cir. 2011), cert. denied, 132 S. Ct. 1952 (2012) 17, 35
United States v. *Terry*, 911 F.2d 272 (9th Cir. 1990) 18, 19
United States v. *Virciglio*, 441 F.2d 1295 (5th Cir. 1971) 26
United States v. *Wacker*, 903 F. Supp. 1412 (D. Kan. 1995) 27
United States v. *Zaleski*, 686 F.3d 90 (2d Cir.), cert. denied, 133 S. Ct. 554 (2012) ..... *passim*

Statutes, regulations, guidelines and rule: Page

Tucker Act:
28 U.S.C. 1346(a)(2) 23
28 U.S.C. 1491 23
21 U.S.C. 841(a)(1) 2
21 U.S.C. 841(b)(1)(D) 2, 4
21 U.S.C. 843(b) 2
21 U.S.C. 846 2
18 U.S.C. 921(a)(3) 11
18 U.S.C. 921(a)(16)(A) 11
18 U.S.C. 922(g)(1) ..... *passim*
18 U.S.C. 922(h)(1) 25
18 U.S.C. 923(c) 20
18 U.S.C. 924(d)(1) 26, 27
41 C.F.R.:
Pt. 101-42:
Section 101-42.1102-10(c) 22
Pt. 128-48:
Section 128-48.102-1 ..... 5, 21
Section 128-48.102-1(d) 21
United States Sentencing Guidelines:
§ 2K2.1(b)(1)(A) 25
§ 2K2.1(b)(1)(B) 26
Fed. R. Crim. P. 41(g) ..... *passim*

Miscellaneous:

John D. Lawson, *The Principles of the American Law of Bailments* (1895) 26
2A Kevin F. O'Malley et al., *Federal Jury Practice and Instructions* (6th ed. 2009) 18, 19

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the *Federal Reporter* but is reprinted at 555 Fed. Appx. 851. The order of the district court (Pet. App. 5a-6a) is unreported. The magistrate judge's report and recommendation (Pet. App. 7a-14a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 2014. On April 17, 2014, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including June 27, 2014. The petition for a writ of certiorari was filed on June 10, 2014, and granted on October 20, 2014. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the Appendix to this brief. App., *infra*, 1a-9a.

STATEMENT

Following a guilty plea in the United States District Court for the Middle District of Florida, petitioner was convicted on one count of distributing less than 50 kilograms of marijuana, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(D). Judgment 1. The district court sentenced petitioner to six months of imprisonment, to be followed by two years of supervised release, including four months of home detention. *Id.* at 2-4. After his conviction, petitioner filed a motion seeking to control the disposition of firearms that he had voluntarily surrendered to agents from the Federal Bureau of Investigation (FBI) after his arrest. J.A. 38-56. A magistrate judge recommended that petitioner's motion be denied, Pet. App. 7a-14a, and the district court adopted the magistrate judge's report and recommendation, *id.* at 5a-6a. The court of appeals affirmed. *Id.* at 1a-4a.

1. Between November 2003 and January 2006, petitioner, a United States Border Patrol Agent, sold marijuana to a confidential source on multiple occasions. Second Superseding Indictment 1-6. A federal grand jury in the Middle District of Florida returned an indictment charging petitioner with two counts of conspiring to distribute less than 50 kilograms of marijuana, in violation of 21 U.S.C. 846; three counts of distributing less than 50 kilograms of marijuana, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(D); and six counts of using a telephone to facilitate that distribution, in violation of 21 U.S.C. 843(b). Second Superseding Indictment 1-6.

On June 7, 2006, petitioner was arrested and appeared at a bond hearing, at which a magistrate judge ordered, as a condition of his release during the pendency of the criminal proceedings, that petitioner "surrender all firearms and law enforcement credentials in [his] possession immediately" to federal law enforcement officers. J.A. 12, 28, 30. In a subsequent written order setting the conditions of petitioner's release issued the same day, the magistrate judge ordered petitioner "immediately to surrender all law enforcement firearms and credentials." J.A. 34. Two days later, petitioner voluntarily surrendered to FBI agents 19 personal firearms or weapons. J.A. 67, 146-147; see J.A. 43-46 (initial handwritten inventory of items collected by FBI agents on June 9, 2006); J.A. 50-56 (subsequent type-written inventory of items).[1] Petitioner later explained that he was motivated to surrender all of his weapons because the judge felt he was "a suicide risk." Pet. App. 2a (quoting J.A. 147).

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[1] The FBI's original handwritten inventory (J.A. 43-46) has 19 numbered items but includes two entries numbered "10," and entry number 19 lists "3 M4 magazines" that are not separately listed on the FBI's subsequent typewritten list, which has 19 numbered items (see J.A. 50-56). Petitioner counts 18 personal firearms because he classifies the Smith & Wesson "Border Patrol" firearm (number 7 on each list, see J.A. 44, 52) as petitioner's "service revolver." See Pet. Br. 5 & n.2. The government has learned that petitioner's service weapon was taken from him when he was arrested on June 7, 2006. The "Border Patrol" firearm collected at his home was a personal firearm issued by Smith & Wesson to commemorate the 50th anniversary of the United States Border Patrol.

On November 30, 2007, petitioner pleaded guilty to one count of distributing marijuana—a felony. Pet. App. 2a, 8a; see 21 U.S.C. 841(b)(1)(D) (distributing 50 kilograms or less of marijuana is punishable by a maximum of five years of imprisonment). On December 6, 2007, his plea was accepted and he was adjudicated guilty. Pet. App. 8a. On April 21, 2008, the district court sentenced petitioner to six months of imprisonment, to be followed by two years of supervised release, including four months of home detention. *Ibid.*; Judgment 2-4.

2. In June 2008, petitioner's attorney wrote a letter to an Assistant United States Attorney inquiring about the firearms that petitioner had turned over to the FBI in 2006. J.A. 78-79. The letter stated that "[petitioner], of course, knows that he is prohibited from possessing the firearms, and therefore would like to make arrangements for his mother, who lives in Panama City, to get them." J.A. 78.

After the letter from his attorney, petitioner repeatedly contacted the FBI between December 2008 and December 2009, seeking to have it transfer his firearms to two different purported buyers. J.A. 80-94. First, petitioner sought to have the FBI transfer all firearms listed on the FBI's inventory to William Boggs, petitioner's next-door neighbor. J.A. 80-84, 150-151. Boggs later decided that he did not want to "become involved" and informed petitioner that he did not want to take possession of the firearms. J.A. 85, 151.

Petitioner next asked the FBI to transfer the firearms to Robert Rosier, petitioner's friend from a camping group. J.A. 85-89, 152, 162; Pet. App. 9a-10a. Petitioner sent the FBI a copy of a "bill of sale," which

stated that petitioner had sold all of the items on the FBI's inventory to Rosier, but did not reflect that Rosier had agreed to pay any amount of money to petitioner. J.A. 87-89, 162-163.

In December 2009, the FBI sent a letter to petitioner stating that he had 30 days to file a claim for the items on the FBI's inventory or that title to the property would otherwise vest in the United States pursuant to 41 C.F.R. 128-48.102-1 (regulation governing abandoned property). J.A. 97-104. Petitioner and Rosier both filed claims within the prescribed period. J.A. 105-119. Petitioner's claim stated that he had legally transferred all of the property to Rosier and that, in the event the property is released to Rosier, petitioner would "relinquish any property interest * * * in the firearms." J.A. 106. Petitioner's claim further stated that if the FBI would not release the property to Rosier, petitioner would retain his "right to transfer [his] interest to a person of [his] choosing." J.A. 106-107. In Rosier's letter asserting a claim to the property, he informed the FBI that he had met petitioner in March 2004 through a camping club and the two "ha[d] since become good friends." J.A. 117. Rosier said he had "agreed to buy the firearms in order to help [petitioner] and his family with their financial situation." J.A. 116.

The FBI denied petitioner's request to transfer the firearms to Rosier and denied petitioner's request for reconsideration of that decision. J.A. 47-56; see Pet. App. 2a, 10a-11a. The FBI explained that "our investigation into the merits of your claim confirms your status as a convicted felon" and noted that "[a]ny firearm possession, actual or constructive, by a convicted felon is prohibited" by 18 U.S.C. 922(g)(1). J.A.

48. Section 922(g)(1) provides that "[i]t shall be unlawful for any person * * * who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" to "possess in or affecting commerce, any firearm or ammunition." 18 U.S.C. 922(g)(1). The FBI stated, among other things, that "release of the firearms to you or your designee, Robert Rosier, as you have requested, would place you in violation of federal law, as it would amount to constructive possession." J.A. 48.

3. On July 16, 2010, petitioner filed in the district court a "Motion to Return/Disposition of Property," J.A. 38-56; 3:06-cr-00211-TJC-TBT-1 Docket entry No. 155, in which he requested that his wife "be given possession and control of the firearms collection for the benefit of [their] adult children and heirs" or, in the alternative, that "Robert Rosier be lawfully entitled to own the subject firearms collection and be awarded possession and control" and that "payment for the firearms be awarded to [petitioner] as the lawful non-possessory owner." J.A. 40; see J.A. 73 (similar request in petitioner's renewed motion). The government construed the motion as having been filed under Rule 41(g) of the Federal Rules of Criminal Procedure, J.A. 59, and petitioner did not question that construction, even in his petition for a writ of certiorari. See Pet. 2, 6 (describing motion as one under Rule 41(g)); J.A. 131 (invoking Rule 41(g) in petitioner's objections to the magistrate judge's report and recommendation); J.A. 177 (appealing from "Denial of Motion to Return Property Under Rule 41(g)"). That construction was also shared by the court of appeals. See Pet. App. 2a, 4a. Rule 41(g) provides as follows:

> **Motion to Return Property.** A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

Fed. R. Crim. P. 41(g).

Petitioner contended that transfer of the firearms to either his wife or to Rosier was warranted because (1) the firearms did not relate to his crime; (2) the FBI did not have probable cause to seize them and did not follow its procedures for seizing property; (3) he had surrendered them only for safekeeping and to satisfy a bond condition; (4) when the FBI took the firearms, it did not tell him that he was effectively abandoning them; (5) he still held legal title to the firearms; and (6) he had neither abandoned the firearms nor forfeited his interest in them. J.A. 70-71; J.A. 157-162, 169-173.

A magistrate judge conducted an evidentiary hearing, at which petitioner reiterated his request for a transfer of his firearms either to his wife, to Rosier, or to "any other person of [petitioner's] choosing who is lawfully entitled to own subject firearm collection." J.A. 161. The magistrate judge asked petitioner during the hearing whether Rosier was a firearms dealer. J.A. 162. The magistrate judge also inquired why the "bill of sale" to Rosier did not show that Rosier had paid any money to petitioner for the firearms. J.A.

162-163. Petitioner confirmed that Rosier is not a firearms dealer, and he informed the magistrate judge that he and Rosier had not yet settled on a sale price. *Ibid.* Petitioner's proposal was that after Rosier received the firearms, "then [he and Rosier] would decide on what would be transferred, as far as funds." J.A. 163. Rosier did not attend the evidentiary hearing. J.A. 140. Petitioner testified at the hearing that "[t]he firearms have been owned by my family and me for many years" and that "[m]any [of the firearms] were given to me by inheritance, trading and buying from family members, friends, co-workers, and other law enforcement officers." J.A. 159.

4. The magistrate judge recommended that petitioner's motion be denied. Pet. App. 7a-14a. The magistrate judge concluded that the case was controlled by the Eleventh Circuit's decision in *United States* v. *Howell*, 425 F.3d 971 (2005). Pet. App. 11a-14a.

a. In *Howell*, the defendant had filed a motion pursuant to Rule 41(g) to recover $140,000 in cash seized at the time of his arrest and firearms seized during a search of his residence. 425 F.3d at 972. With respect to the firearms, the court of appeals concluded that although the defendant was the undisputed owner of the firearms, a court could not return the firearms to him because doing so would violate Section 922(g)(1). *Id.* at 974. "[I]f an individual is a convicted felon," the court explained, "that individual will not be entitled to the return of seized firearms, either directly or indirectly. Requiring a court to return firearms to a convicted felon would not only be in violation of a federal law, but would be contrary to the public policy behind the law." *Id.* at 976.

The court in *Howell* further rejected the defendant's alternative request that the court should "either place the firearms in the possession of a relative in trust or sell the firearms and distribute the proceeds to [the defendant]." 425 F.3d at 977. The court explained that such relief "is beyond the scope of Rule 41(g)." *Id.* at 976-977. "Rule 41(g)," the court explained, "deals solely with the return of property." *Id.* at 977. The court further explained that the defendant was not entitled to have the firearms held in trust for him by a third party because "[s]uch a request suggests constructive possession," and "[a]ny firearm possession, actual or constructive, by a convicted felon is prohibited by law." *Ibid.* (quoting *United States* v. *Felici*, 208 F.3d 667, 670 (8th Cir. 2000), cert. denied, 531 U.S. 1201 (2001)).

The court in *Howell* separately noted that Rule 41(g) provides for only equitable relief and that the defendant was not entitled to such relief because, as someone who had engaged in drug dealing, he had "unclean hands." 425 F.3d at 974.

b. The magistrate judge concluded that petitioner's motion was controlled by *Howell*. Pet. App. 13a. The magistrate judge rejected petitioner's attempt to distinguish *Howell* on the grounds that the firearms in that case had been "seized," whereas petitioner's firearms had been voluntarily turned over to the FBI as a condition of his release on bond. *Id.* at 12a-14a; J.A. 39, 70-71; cf. J.A. 127-128 (objections to magistrate judge's report and recommendation). The magistrate judge explained that, even though petitioner's firearms had not been "seized," were not contraband, and had not been forfeited, petitioner had not "attempt[ed] to transfer ownership of the firearms to

another person until *after* he had been adjudicated guilty and was a convicted felon," and such a transfer would amount to constructive possession in violation of Section 922(g)(1). Pet. App. 12a-14a.

5. Petitioner filed objections to the magistrate judge's report and recommendation. J.A. 126-133. After conducting *de novo* review, the district court overruled those objections, adopted the magistrate judge's report and recommendation, and denied petitioner's motion. Pet. App. 5a-6a.

6. Petitioner appealed. See J.A. 177 ("Appeal of Denial of Motion to Return Property under Rule 41(g)."). The court of appeals affirmed. Pet. App. 1a-4a. The court agreed that its prior decision in *Howell* prevents courts from "violating [Section] 922(g) by delivering actual or constructive possession of firearms to a convicted felon" and "controls" the decision in this case. *Id.* at 3a-4a. The court noted that the method by which the government acquired the firearms was "immaterial" in *Howell*, and it stated that "[t]he fact that the government obtained [petitioner's] firearms because of a voluntary surrender pursuant to a judge's concern for his safety does not alleviate the concern that by granting [petitioner] actual or constructive possession of a firearm, a court would violate [Section] 922(g)." *Id.* at 4a (citing *Howell*, 425 F.3d at 976).

Because petitioner had invoked the district court's authority to "grant equitable relief" under Rule 41(g) (J.A. 194), the court of appeals added that petitioner, as a convicted drug offender, had "unclean hands to demand return of his firearms" even though he "did not use those firearms in furtherance of his offense." Pet. App. 4a (citing *Howell*, 425 F.3d at 974). The

court further noted that petitioner had argued for the first time on appeal "that several of the nineteen firearms are not covered" by Section 922(g)(1). *Id.* at 3a n.1. The court declined to address that argument because petitioner had not raised it below. *Ibid.*[2]

SUMMARY OF ARGUMENT

I. Although petitioner did not cite Federal Rule of Criminal Procedure 41(g) in the motion that he filed in the district court, the government construed the motion as one under that rule, and the magistrate judge and court of appeals adopted that construction. Rule

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[2] Petitioner contends (Pet. Br. 5) that his firearms collection included "[i] a crossbow, [ii] a 'nonfunctional' antique 'Japanese Arisika * * * rifle,' [iii] a nonfunctional "wall [h]anger,' and [iv] a 'nonfunctional' 'homemade muzzle-loading rifle,'" which he contends are not firearms under federal law. Petitioner did not bring this to the attention of the district court, and it was an oversight on behalf of the United States that the collection included weapons that are not firearms.

Although petitioner lists four weapons that he contends are not firearms, the "wall [h]anger" and the "homemade muzzle-loading rifle" (Pet. Br. 5) are references to the same gun. See J.A. 45 (item number 15 on the FBI's handwritten inventory describing a "Black Powder-wall Hanger" with serial number f3-126855); J.A. 55 (item number 16 on the FBI's subsequent type-written inventory describing a "Homemade percussion cap muzzle-loading rifle, nonfunctional" with serial number 83-126855). The United States agrees that the crossbow and the muzzle-loading rifle are not firearms, but it is the government's position that the Japanese Arisika rifle is a firearm. It was manufactured well after 1898 and is not an antique, see 18 U.S.C. 921(a)(16)(A), and it is designed to expel a projectile by the action of an explosive, 18 U.S.C. 921(a)(3). Although the gun appears to be missing part of the firing mechanism, it "may readily be converted" to functionality with a new part. *Ibid.* The FBI is making the necessary arrangements to return the crossbow and the muzzle-loading rifle to petitioner.

41(g) provides that when a court grants a motion under the rule, it "must return the property to the movant." Fed. R. Crim. P. 41(g). Petitioner's question presented asks, in part, whether a court may order the government, under Rule 41(g), to transfer non-contraband firearms to a third party to whom the convicted felon has sold his property interests. The answer to that question is "no," because Rule 41(g) states that property transferred under that rule must be returned to the movant. Rule 41(g) does not provide authority for a transfer of the movant's property to a third party.

II. If the Court considers petitioner's motion as one that invoked the general civil equitable jurisdiction of the district court, the court of appeals' decision should nevertheless be affirmed because the district court acted within its discretion when it denied petitioner's request to transfer his firearms to his wife or to Rosier. The district court was not required to grant relief that would allow petitioner to control the sale of his firearms or that could result in his continued ability to control the firearms through others. The relief petitioner requested did not eliminate those possibilities.

A. Section 922(g)(1) does not terminate a felon's ownership interest in firearms; it is a ban on possession. But Section 922(g)(1) prohibits both actual and constructive possession of firearms, and constructive possession is established when a person has the power and intention to exercise dominion or control over property, either directly or through others.

B. Because Section 922(g)(1) does not extinguish a convicted felon's ownership interest in firearms, a person who seeks to maintain or transfer his owner-

ship interest after being convicted of a felony is not categorically prohibited from doing so. But he may not transfer his ownership interest in a way that results in his actual or constructive possession of the firearms.

One way that a convicted felon could divest himself of his ownership interest in firearms without violating Section 922(g)(1)'s ban on possession is for his firearms to be transferred to a federal firearms licensed dealer, who would sell the firearms on consignment and give the net proceeds to the convicted felon. So long as the felon does not exercise control over the firearms during or after the sale, his receipt of money in exchange for his ownership interest would not amount to constructive possession.

Another option that some courts have discussed with approval is that a convicted felon may select a third party to receive his firearms. Courts that have endorsed this option have stated that it would be appropriate for any such transfer to be conditioned on the third party's assurances that he or she would not return the firearms to the convicted felon or follow his instructions. Even with proper assurances, however, this option would still amount to constructive possession, because the convicted felon exercises control over the firearms when he selects the next recipient and controls their destination.

C. Petitioner characterizes the court of appeals' decision as holding that a person is barred for all time from realizing the value of his firearms after he is convicted of a felony. Characterizing the decision in that way, petitioner contends that the court has ignored the distinction between ownership and possession, permitted the government to forfeit property

without following proper procedures, and unnecessarily raised a plethora of constitutional concerns. But the court of appeals did not hold—and it is not the government's position—that a defendant loses his ownership interest in non-contraband firearms after he is convicted of a felony. Instead, the courts below evaluated the specific relief requested by petitioner and concluded that such relief was not warranted because of concerns about petitioner's actual or constructive possession of the firearms.

D. Given the specific relief requested by petitioner—that his firearms collection be transferred to his wife or his good friend Rosier—the district court acted within its discretion when it denied petitioner's motion. Petitioner's requested relief would have allowed him to control who next had access to the firearms, which would result in constructive possession. Furthermore, the requested relief did not sufficiently ensure that petitioner would not continue to have control over the firearms, because he offered no assurances from either of his selected recipients that they would not return the firearms to him or follow his instructions.

ARGUMENT

I. RULE 41(G) DOES NOT CONTEMPLATE A TRANSFER OF PROPERTY TO A THIRD PARTY

The motion petitioner filed in the district court was a "Motion for Return/Disposition of Property." J.A. 38. Although petitioner did not cite Federal Rule of Criminal Procedure 41(g), the government construed the motion as one under that rule, which is entitled "Motion to Return Property," *ibid.*; see J.A. 59, and the magistrate judge adopted that construction, Pet. App. 11a. Consistent with the title of petitioner's

brief, J.A. 177, the court of appeals likewise analyzed the issue under Rule 41(g), Pet. App. 1a-4a. And in seeking certiorari, petitioner acknowledged that his motion was brought pursuant to Rule 41(g). Pet. 6-7; see Pet. 2 ("petitioner filed a motion under Fed. R. Crim. P. 41(g) asking that the guns be transferred to the buyer or, alternatively, to petitioner's wife").

Petitioner's question presented asks, in part, whether a court may order the government, under Rule 41(g), to transfer non-contraband firearms belonging to a convicted felon to a third party to whom the felon has sold his property interests. The answer to that question is "no." Rule 41(g) states that, when a court grants a motion under the rule, it "must *return the property* to the movant." Fed. R. Crim. P. 41(g) (emphasis added). But Rule 41(g) does not provide authority for the action petitioner sought: a transfer to a third party that he designates. See *Ordonez* v. *United States*, 680 F.3d 1135, 1139 (9th Cir. 2012) ("The Rule by its very terms provides only for the 'return [of] the property to the movant,' nothing more.") (brackets in original; citation omitted); *United States* v. *Howell*, 425 F.3d 971, 977 (11th Cir. 2005) (explaining that a request that the court "either place the firearms in the possession of a relative in trust or sell the firearms and distribute the proceeds to [the defendant]" was "beyond the scope of Rule 41(g)"); *ibid.* ("Rule 41(g) deals solely with the return of property."). Petitioner does not, and cannot, deny that the firearms cannot actually be "return[ed]" to him without causing him to be in violation of Section 922(g)(1)'s prohibition on the possession of firearms by convicted felons.

Sometimes a motion under Rule 41(g) will be the correct mechanism to seek the return of property that remains in the government's possession after the close of criminal proceedings. For example, Rule 41(g) is properly invoked if the defendant has been acquitted, if the defendant is convicted of a misdemeanor that does not trigger Section 922(g)(1)'s ban on firearm possession, or if the government is holding non-contraband property that the defendant is not prohibited from possessing. By its terms, however, Rule 41(g) cannot be invoked to request that a court order a transfer of property to someone other than the movant.

II. IF PETITIONER'S MOTION IS CONSIDERED AS A MORE GENERAL MOTION INVOKING THE DISTRICT COURT'S CIVIL EQUITABLE JURISDICTION, THE DISTRICT COURT ACTED WITHIN ITS DISCRETION WHEN IT DENIED THE MOTION

Although the courts below viewed petitioner's motion as one brought under Federal Rule of Criminal Procedure 41(g), petitioner contends (Br. 7-9) that his intention was to invoke the more general civil equitable jurisdiction of the district court. If the Court considers petitioner's motion in that way, the court of appeals' decision should nevertheless be affirmed because the district court acted within its discretion when it denied petitioner's request to transfer his firearms collection to his wife or to Rosier. See *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 718 (1996) (noting the "historic discretion exercised by federal courts 'sitting in equity'") (citation omitted); cf. *Howell*, 425 F.3d at 974 ("A motion to return seized property under Fed. R. Crim. P. 41(g)[] is a motion in equity, in which courts will determine all the equitable

considerations in order to make a fair and just decision."); *United States* v. *Zaleski*, 686 F.3d 90, 92 (2d Cir.) (motion for return of property is available only when the equities favor the exercise of jurisdiction), cert. denied, 133 S. Ct. 554 (2012).

A district court's equitable jurisdiction must be exercised "with caution and restraint," and exercise of that jurisdiction is appropriate only when necessary to "prevent manifest injustice" in light of the movant's conduct and his request. *United States* v. *Eubanks*, 169 F.3d 672, 674 (11th Cir. 1999) (per curiam). The court's weighing of equitable considerations and its decision to deny equitable relief are reviewed for an abuse of discretion. See *United States* v. *Shigemura*, 664 F.3d 310, 312 (10th Cir. 2011), cert. denied, 132 S. Ct. 1952 (2012); *United States* v. *Mochado*, 465 F.3d 1301, 1307 (11th Cir. 2006), abrogation on other grounds recognized by *United States* v. *Lopez*, 562 F.3d 1309, 1311-1313 (11th Cir. 2009); *Zaleski*, 686 F.3d at 92. The district court was not required to grant relief that would allow petitioner to control the sale of his firearms or that could result in his continued control over the firearms, in violation of Section 922(g)(1). The relief petitioner requested did not eliminate those possibilities.

A. Convicted Felons May Not Actually Or Constructively Possess Firearms

Petitioner correctly observes (Pet. Br. 14-23) that 18 U.S.C. 922(g)(1) does not terminate a felon's ownership interest in firearms. See, *e.g.*, *United States* v. *Miller*, 588 F.3d 418, 420 (7th Cir. 2009) (convicted felon's "property interest in [his] firearms continues even though his possessory interest has been curtailed"); *Cooper* v. *City of Greenwood*, 904 F.2d 302,

304 (5th Cir. 1990) (convicted felon's "claimed ownership interest in [his] firearms survived his criminal conviction"). Section 922(g)(1) is a ban on possession. It prohibits "any person * * * who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" from "possess[ing] in or affecting commerce, any firearm or ammunition." 18 U.S.C. 922(g)(1).

Although Section 922(g)(1) does not prohibit ownership of firearms, it prohibits both actual and constructive possession. See *United States* v. *Farmer*, 770 F.3d 1363, 1367 (10th Cir. 2014); *United States* v. *Schmitt*, 770 F.3d 524, 534 (7th Cir. 2014); *United States* v. *Ridolfi*, 768 F.3d 57, 61 (1st Cir. 2014); *United States* v. *Benjamin*, 711 F.3d 371, 376 (3d Cir.), cert. denied, 134 S. Ct. 309 (2013); *United States* v. *Meza*, 701 F.3d 411, 419 (5th Cir. 2012); *United States* v. *Bryant*, 523 F.3d 349, 354 (D.C. Cir. 2008); *United States* v. *Gardner*, 488 F.3d 700, 713 (6th Cir. 2007); *United States* v. *Davis*, 449 F.3d 842, 846 (8th Cir. 2006); *United States* v. *Scott*, 424 F.3d 431, 435 (4th Cir.), cert. denied, 546 U.S. 1051 (2005); *United States* v. *Gunn*, 369 F.3d 1229, 1235 (11th Cir.) (per curiam), cert. denied, 543 U.S. 937 (2004); *United States* v. *Payton*, 159 F.3d 49, 56 (2d Cir. 1998); *United States* v. *Terry*, 911 F.2d 272, 278 (9th Cir. 1990); see also 2A Kevin F. O'Malley et al., *Federal Jury Practice and Instructions* § 39.12 (6th ed. 2009) ("The law recognizes two kinds of 'possession'—actual possession and constructive possession.").

Actual possession is a familiar concept that exists when a person "knowingly has direct physical control over a thing at a given time." 2A O'Malley § 39.12; see, *e.g.*, *Meza*, 701 F.3d at 419. Constructive posses-

sion is established when a person "knowingly has the power and intention at a given time of exercising dominion and control over [the property], either directly or through others." *Ridolfi*, 768 F.3d at 61-62 (citation and internal quotation marks omitted); see *Farmer*, 770 F.3d at 1367; *Benjamin*, 711 F.3d at 376; *United States* v. *Reed*, 636 F.3d 966, 969-970 (8th Cir. 2011); *Bryant*, 523 F.3d at 354-355; *Gardner*, 488 F.3d at 713-714; *Gunn*, 369 F.3d at 1235; *United States* v. *Dhinsa*, 243 F.3d 635, 677 (2d Cir.), cert. denied, 534 U.S. 897 (2001); *United States* v. *McKnight*, 953 F.2d 898 (5th Cir.), cert. denied, 504 U.S. 989 (1992); *Terry*, 911 F.2d at 279; see 2A O'Malley § 39.12 ("A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it."). The doctrine of constructive possession thus "allows the law to reach beyond puppets to puppeteers." *United States* v. *Al-Rekabi*, 454 F.3d 1113, 1118 (10th Cir. 2006).

Accordingly, although Section 922(g)(1) does not extinguish a convicted felon's ownership interest in firearms, it prohibits him from having direct physical access to firearms (actual possession), and it prohibits him from exercising control over firearms through others (constructive possession).

B. It Is Possible For A Convicted Felon To Transfer His Ownership Interest In Firearms Without Violating Section 922(g)(1)'s Ban On Possession

Because Section 922(g)(1) does not extinguish a convicted felon's ownership interest in firearms, a person who seeks to maintain or transfer his ownership interest after being convicted of a felony is not

categorically prohibited from doing so, but he may not transfer his ownership interest in a way that results in his actual or constructive possession of the firearms. See *Zaleski*, 686 F.3d at 93 ("[U]nder limited circumstances[,] a convicted felon may arrange to benefit from the sale of otherwise lawful, unforfeited firearms by a third party without actually or constructively possessing them.").

1. a. One option courts have considered is that a convicted felon's firearms could be transferred to a federal firearms licensed dealer, see 18 U.S.C. 923(c), who would sell the firearms on consignment and give the net proceeds to the convicted felon. In *Zaleski*, the defendant had asked the district court to permit the transfer of his firearms to a federally licensed gun dealer who had agreed to sell them and remit the proceeds to the defendant. 686 F.3d at 92.[3] The Second Circuit held that, in light of that request, the district court had erred in concluding that the defendant was categorically ineligible for any relief. *Id.* at 93-94.

The court in *Zaleski* explained that the defendant's "proposed arrangement" could "be approved without running afoul of Section 922(g)(1) if" the following three conditions were satisfied: (1) "the evidence shows that transferring the weapons to [the firearms dealer] would *in fact* strip Zaleski of any power to

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[3] In *Zaleski*, the firearms at issue were seized as part of a "large cache of firearms, ammunition, and explosives at Zaleski's home" during his arrest. 686 F.3d at 91. Although some of the seized firearms were unlawfully possessed and forfeited by the federal government, others were lawfully possessed and not subject to forfeiture, but nevertheless remained in the government's possession. *Ibid.*

exercise dominion and control over them," (2) the dealer "is a suitable custodian and not subject to Zaleski's control," and (3) "the arrangement is otherwise equitable." 686 F.3d at 93. The decision in *Zaleski* thus strongly implied that where such conditions are not present, a court should not grant (or at least is not compelled to grant) a convicted felon's request to transfer firearms.

The fact that a convicted felon receives money from a sale of his firearms would not run afoul of Section 922(g)(1)'s ban on possession. See *Zaleski*, 686 F.3d at 93 ("The possibility that Zaleski will receive a financial benefit from [the] sale of the firearms and ammunition to compensate him for his non-possessory property interest in them does not, standing alone, mean that he constructively possesses them."). So long as the convicted felon does not exercise control over the firearms during or after the sale, either directly or through others, the sale of his firearms by a federally licensed dealer would not result in constructive possession.[4]

b. Petitioner's question presented asks, in part, whether a court may "order[] * * * *the government*" to "sell [non-contraband] firearms for the benefit of [a convicted felon]." Pet. I (emphasis added). Although a court could order a convicted felon's firearms trans-

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[4] Although a convicted felon is not prohibited from receiving money from a sale of his firearms, he may still choose to abandon his ownership interest in firearms. See 41 C.F.R. 128-48.102-1. If he does so, title would vest in the United States, 41 C.F.R. 128-48.102-1(d), and the firearms could then be destroyed. Many convicted felons will voluntarily abandon their firearms as part of a plea agreement, and others will decide to do so after receiving a letter similar to the letter received by petitioner in this case. J.A. 97-98.

ferred to a firearms dealer for a consignment sale in the manner described above, regulations promulgated by the General Services Administration prohibit the federal government from selling firearms, except as scrap metal. See 41 C.F.R. 101-42.1102-10(c) ("Surplus firearms may be sold only for scrap after total destruction by crushing, cutting, breaking, or deforming to be performed in a manner to ensure that the firearms are rendered completely inoperative and to preclude their being made operative."). Courts therefore should not order the government to sell a convicted felon's non-contraband firearms.[5]

2. a. Another option courts have considered is that a convicted felon could dispose of his ownership interest in firearms by transferring the firearms to a third party selected by the convicted felon. See *Miller*, 588 F.3d at 420. Courts that have discussed this option with approval have stated that it would be appropriate for any such transfer to be conditioned on the third party's assurances that he or she would not return the firearms to the convicted felon or follow his instructions.

In *Miller*, for example, the district court had authorized the government to destroy the defendant's firearms. 588 F.3d at 419.[6] The Seventh Circuit held

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[5] Petitioner states (Pet. Br. 30 n.4) that in *Cooper*, *supra*, "the Government sold [a convicted felon's] firearm collection for over $300,000." To clarify, in *Cooper*, a local government—not the federal government—sold the convicted felon's non-forfeited firearms at public auction for $30,000 and provided him with none of the proceeds. 904 F.2d at 304.

[6] The firearms at issue in *Miller* were seized during a search of the defendant's farm but had not been forfeited. 588 F.3d at 418-419.

that the district court had erred because destroying the firearms—and having the government pay the defendant just compensation as calculated through an action under the Tucker Act, 28 U.S.C. 1346(a)(2) and 1491—was not the sole option available to the court. 588 F.3d at 419-420. The court stated (without citation or further explanation) that another permissible resolution would have been to give the firearms "to one of [the defendant's] friends or relatives," which could be "conditioned on the recipient's written acknowledgement that returning the guns to [the defendant] or honoring his instructions would aid and abet [the defendant's] unlawful possession." *Id.* at 420; see *Zaleski*, 686 F.3d at 93-94 (stating that the third-party transferee must be "a suitable custodian and not subject to [the convicted felon's] control").

Constructive possession encompasses "control or dominion over property without actual custody of it." *Miller*, 588 F.3d at 419. Accordingly, a person who never touches a firearm but retains the authority to direct that Person A may possess the firearm on Monday, Person B may possess it on Tuesday, and so on, would constructively possess that firearm. The court therefore could not, consistent with Section 922(g)(1), transfer firearms "to someone willing to accept [the felon's] instructions about their disposition." *Ibid.*

b. Although some courts have discussed with approval the option of allowing a convicted felon to select a third-party recipient of his firearms, that option would still amount to constructive possession, even with proper assurances from the third party. Although third-party assurances may prevent the convicted felon from having continuing control over the

firearms after the first transfer, allowing the felon to select the first recipient of the firearms gives him control over them.

In petitioner's view, the government could transfer firearms to a third party on behalf of the convicted-felon owner, and such a transfer could be made without "giv[ing] the owner" (*i.e.*, petitioner) any "'right to control' or 'right to exclude'—the two central indicia of possession." Pet. Br. 16. Petitioner's proposed transaction, however, cannot be reconciled with his own theory. Because petitioner's request would require the firearms to be transferred to a person of petitioner's own choosing, petitioner would, contrary to his suggestion (*ibid.*), have and exercise a "right to control" or "right to exclude." The transfer would permit petitioner to determine who would (and who would not) next have access to the firearms.

The felon exercises his right to control or to exclude by selecting the recipient (and ruling out others), even though he may need a court order to effectuate the transfer because the firearms happen to be in the government's custody. Although the court grants or denies the transfer after considering equitable factors, and thus exercises its own measure of control, if the court approves the request made by the defendant to transfer to a specific person, then the felon has indirectly exercised at least some measure of authority to control and to exclude.

Petitioner contends (Pet. Br. 18) that the court of appeals did not "articulate the point in the transaction where the convicted owner attains possession." Though the convicted felon would not attain *actual* possession of his firearms if they were transferred from the government to a third party of the felon's

choosing, he would have constructive possession because he controls the destination of the firearms. If that does not amount to constructive possession, then a gang leader who is convicted of a felony can require the court to order his firearms transferred to fellow gang members. The purpose of Section 922(g)(1) is to "keep guns out of the hands of those who"—like a corrupt federal law enforcement officer—"have demonstrated that they may not be trusted to possess a firearm without becoming a threat to society." *Small* v. *United States*, 544 U.S. 385, 393 (2005) (citation and internal quotation marks omitted). And because possession encompasses constructive possession, Section 922(g)(1) deems convicted felons untrustworthy of both actually possessing firearms and exercising control over them. Indeed, Congress was sufficiently concerned with convicted felons having the ability to direct actions involving firearms that Congress made it unlawful for anyone who is employed by a convicted felon "to receive, possess, or transport any firearm * * * in or affecting interstate or foreign commerce" in the course of that employment. 18 U.S.C. 922(h)(1).

In analogous contexts, courts have concluded that felons who brokered sales of firearms constructively possessed the firearms that they sold. See *United States* v. *Nungaray*, 697 F.3d 1114, 1115-1117 (9th Cir. 2012) (finding constructive possession for purposes of Sentencing Guidelines § 2K2.1(b)(1)(A) where a convicted felon offered to sell firearms to a confidential informant, negotiated the sale price, and then directed someone else to deliver the firearms to the buyer); *United States* v. *Hood*, 507 Fed. Appx. 859, 861 (11th Cir. 2013) (per curiam) (defendant construc-

tively possessed firearms for purposes of Sentencing Guidelines § 2K2.1(b)(1)(B) when he contacted confidential sources and agreed to sell them the firearms, which were then handed over to the buyers by the defendant's associates); *United States* v. *Virciglio*, 441 F.2d 1295, 1298 (5th Cir. 1971) (holding that defendant had constructive possession of machine guns because he "planned the[ir] sale"). Those findings of constructive possession were based on the defendants' ability to control the destination of the firearms. See, *e.g.*, *Nungaray*, 697 F.3d at 1117 (defendant "controlled the sale of the guns from start to finish"); *Virciglio*, 441 F.2d at 1298 (defendant "exercise[d] dominion and control over the machine gun" by planning its sale); see also *Al-Rekabi*, 454 F.3d at 1120 ("A knowing ability to control is all constructive possession requires.").

c. Petitioner's analogies to the law of bailment or a landlord-tenant lease are inapposite. Petitioner contends (Pet. Br. 17-18) that as a "bailor," he has no right to control his firearms or to exclude others from using them while they are in the FBI's possession, and he does not "temporarily regain possession in violation of the bailment agreement" when he sells the property to a third party. But by exercising his right to "terminate the bailment when he pleases" and directing the government to transfer the firearms to someone else, petitioner exercises control over the property. John D. Lawson, *The Principles of the American Law of Bailments* § 29 (1895).

d. One of petitioner's amici points out that if the owner or possessor of a seized firearm is *acquitted*, 18 U.S.C. 924(d)(1) requires that the firearm be returned "to the owner or possessor or to a person dele-

gated by the owner or possessor unless the return of the firearms * * * would place the owner or possessor or his delegate in violation of law." Nat'l Ass'n of Crim. Def. Lawyers Amicus (NACDL) Br. 13-14 (quoting 18 U.S.C. 924(d)(1)). According to NACDL, that provision "confirms that a person who may not lawfully possess a firearm does not commit an act of possession by assigning his or her ownership interest in a firearm to a delegate." *Id.* at 14. Section 924(d)(1) does not answer that question.

Circumstances other than a person's status as a convicted felon may cause him to request that his firearms be released to a delegate. For example, he may be serving a prison term for a misdemeanor and thus be unable to receive the firearms while he is incarcerated, or he may no longer wish to own the firearms having just been through a criminal trial. The fact that a person who has been acquitted of criminal conduct may choose to delegate another person to receive his firearms does not answer the question whether transferring firearms to the delegate of a convicted felon would "place the [convicted-felon] owner * * * in violation of law." 18 U.S.C. 924(d)(1); see *United States* v. *Wacker*, 903 F. Supp. 1412, 1414-1415 (D. Kan. 1995) (convicted felon may not "control the possession" of a firearm by appointing an agent to receive it and sell it for him).

In sum, in certain circumstances, a convicted felon may transfer ownership of his firearms without running afoul of Section 922(g)(1)'s ban on possession. Under appropriate circumstances, he may receive the value of his firearms through a consignment sale conducted by a federal firearms licensed dealer. Some courts have also concluded that a convicted felon may

designate a third party to receive his firearms with proper assurances that the recipient will not allow the felon to have further control over the firearms, but those courts did not consider whether permitting the felon to select the recipient is a form of constructive possession. Regardless of the precise scope of relief that is available, Section 922(g)(1) does not categorically bar a convicted felon from transferring ownership of his firearms or receiving their value after a sale.

C. The Court Of Appeals Did Not Hold That Section 922(g)(1) Extinguishes A Convicted Felon's Ownership Interest In Firearms

Petitioner characterizes the court of appeals' decision as holding that a convicted felon is barred "for all time from lawfully realizing the value of the[] sale [of his firearms]." Pet. Br. 26; see *id.* at 2, 15, 19, 34-35. Characterizing the court's decision in that way, petitioner contends that the decision "effectively strip[s] [convicted felons] of their entire ownership interest" in firearms, even though Section 922(g)(1) is only a ban on possession. *Id.* at 2. But the court of appeals did not hold—and, contrary to petitioner's assertions (*e.g.*, *id.* at 2, 25, 33-34), the government does not contend—that a defendant loses his ownership interest in non-contraband firearms after he is convicted of a felony. Rather, the courts below evaluated the specific relief requested by petitioner and concluded that such relief was not warranted because of concerns about petitioner's actual or constructive possession of the firearms.

1. Petitioner asked the district court for a specific type of relief. In his motion, he requested that his wife "be given possession and control of the firearms

collection for the benefit of [their] adult children and heirs" or, in the alternative, that "Robert Rosier be lawfully entitled to own the subject firearms collection and be awarded possession and control" and that "payment for the firearms be awarded to [petitioner] as the lawful non-possessory owner." J.A. 40; see J.A. 73 (similar request in petitioner's renewed motion). At the evidentiary hearing before the magistrate judge, petitioner requested a transfer of his firearms either to his wife, to Rosier, or to "any other person of [petitioner's] choosing who is lawfully entitled to own subject firearm collection." J.A. 161. It was the magistrate judge's understanding that "the relief sought by [petitioner's] motion requests the firearms be given to either [petitioner's] wife or Mr. Robert Rosier." Pet. App. 8a; see J.A. 136-137 (magistrate judge confirming at the evidentiary hearing that it was the United States' position "that the property cannot or should not be returned or disposed of in any way that [petitioner] seeks").

Petitioner did not request that his firearms be transferred to a federal firearms licensed dealer and sold for his benefit.[7] Nor did he offer any assurances

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[7] Petitioner claims that in the court of appeals, he "outlined several different equitable means through which the courts could grant him relief," Pet. Br. 9, including by ordering a sale of the firearms for his account through an arrangement where petitioner would not set the value or "direct[] the sale or purchase of the firearms" but instead would "merely [be] compensated for the value of [the] property by a neutral third-party." *Id.* at 9-10 (quoting J.A. 193-194 (petitioner's court of appeals brief). The court of appeals, however, was entitled to evaluate the district court's decision based on the relief requested from that court—transfer of the firearms to petitioner's wife, to Rosier, or to another person of petitioner's choosing. The court of appeals was not required to

from his wife or from Rosier that they would agree not to return the firearms to petitioner or to follow his instructions. Rosier did not even attend the hearing. J.A. 140. Although petitioner appeared pro se in the lower courts, he cited *Zaleski* and *Miller* in his briefs and in his testimony (J.A. 71, 170, 183, 186, 189-190, 193), and he presumably understood that such assurances may be required before a court will order firearms transferred to a third party selected by the convicted felon. See *Miller*, 588 F.3d at 420; *Zaleski*, 686 F.3d at 93-94.

Thus, contrary to petitioner's contention (Pet. Br. 26), the court of appeals did not hold that convicted felons effectively lose their ownership interest in firearms or are categorically barred from realizing any value from their sale. Rather, the court held that the relief petitioner sought—transfer of the firearms to his wife or to Rosier—was not warranted because of "the concern that by granting [petitioner] actual or constructive possession of a firearm, [the] court would violate [Section] 922(g)." Pet. App. 4a.

The court of appeals followed its prior decision in *Howell*. Pet. App. 3a-4a. *Howell* likewise did not hold that convicted felons are categorically barred from receiving any financial value for firearms that they may no longer possess. The court in *Howell* held that returning firearms to a convicted felon "would be a clear violation of [Section] 922(g)," 425 F.3d at 976, and that the defendant's alternative request "to either place the firearms in the possession of a relative in trust or sell the firearms and distribute the proceeds to him" was "beyond the scope of Rule 41(g)," which

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devise relief based on a new request made for the first time in petitioner's appellate brief.

"deals solely with the return of property." *Id.* at 977-978. The court further explained that a defendant is "not entitled to have * * * firearms held in trust for him by a third party" because "[s]uch a request suggests constructive possession." *Id.* at 977 (quoting *United States* v. *Felici*, 208 F.3d 667, 670 (8th Cir. 2000), cert. denied, 531 U.S. 1201 (2001)). The court expressly declined to decide whether the defendant could file suit against the United States to recover the value of the firearms, *id.* at 977 n.4, thus demonstrating the court's understanding that the defendant potentially retained an ownership interest in the firearms.[8]

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[8] Consistent with controlling precedent in *Howell*, 425 F.3d at 974, the government argued in the court of appeals that petitioner could not be the beneficiary of equitable relief afforded by Rule 41(g) because, as a convicted felon, he had unclean hands. The court of appeals followed *Howell*, holding that a defendant convicted of a drug offense has unclean hands to demand the return of firearms, even if the firearms were not used in furtherance of the offense. Pet. App. 4a. The government does not rely on that argument as a basis for affirming the court of appeals' decision. This case does not present the question whether a court of equity could decline to provide relief in derivative contraband cases—i.e., cases involving property that is not contraband *per se*, but that had become forfeitable because of unlawful use. See *Felici*, 208 F.3d at 670 (failure to initiate a forfeiture action "should not prevent the government from being able to assert, in resistance to a Rule 41(e) motion, a limited derivative contraband theory, i.e., that the items sought to be returned were in fact utilized or intended to be utilized by the person who possessed them for the manufacture, storage, or transportation of controlled substances"); *United States* v. *Clymore*, 245 F.3d 1195, 1200 (10th Cir. 2001) (per curiam); *Sash* v. *United States*, No. 09 Civ. 450 (DC), 2009 WL 3007379, at *5 (S.D.N.Y. Sept. 22, 2009).

Likewise, the Eighth Circuit in *Felici*, which was cited by the court of appeals in *Howell*, neither stated that a convicted felon loses ownership rights in firearms nor addressed the possibility of a sale to a neutral third party. The court held that the defendant's request to have a third party hold firearms in trust for a convicted felon "suggest[ed] constructive possession." 208 F.3d at 670. The question whether the beneficiary of a trust retains some level of control over the contents of the trust sufficient to raise concerns about constructive possession is not presented here.

2. Because the court of appeals did not hold that a convicted felon is barred from realizing any financial value from his ownership interest in firearms, the extended arguments of petitioner and his amici that the court's decision ignores the distinction between ownership and possession (Pet. Br. 14-23); permits the government to forfeit property without following proper procedures (*id.* at 25-28); and raises constitutional concerns about due process (*id.* at 28-32), the taking of property without just compensation (*id.* at 32-33), unreasonable seizures (*id.* at 33), and excessive fines (*id.* at 35) are inapposite.

Petitioner's contention (Pet. Br. 33-35) that the court of appeals' decision raises Second Amendment concerns is particularly misplaced. He contends (*ibid.*) that if a firearm owner cannot divest himself of his ownership interest after being convicted of a felony, he is left with "three bad options": (1) to be released on bond but effectively forfeit his firearms if he is convicted; (2) to sell or give away his firearms "before [he] has even been accused," leaving him unable to defend himself; or (3) to forgo his ability to be re-

leased on bond while the criminal charges are pending and then "face possible liability under Section 922(g) upon conviction." *Id.* at 34. Petitioner faced no such dilemma.

As explained above (see pp. 19-28, *supra*), a convicted felon is not forever barred from receiving any financial benefit from his firearms if he fails to transfer ownership before he is convicted of a felony. Furthermore, there is no reason why petitioner would need to sell his firearms "before [he] [is] even * * * accused" of a crime in order to ensure that he will be permitted to dispose of his ownership interest in them in accordance with his preferences. Pet. Br. 34. Of course, petitioner voluntarily agreed to turn over his firearms (and thus voluntarily relinquished his ability to protect himself with the firearms) after he was accused of criminal activity in exchange for the ability to be released on bond. But even after he did so, he remained free to sell or transfer his firearms before he was adjudicated guilty of a felony on December 6, 2007. See Pet. App. 8a. Petitioner acknowledged in his plea agreement (entered on November 30, 2007) that he would "be adjudicated guilty of the offense[] to which [he] ha[d] pleaded" and that because the offense was a felony, he would "thereby be deprived of * * * the right * * * to have possession of firearms." 3:06-cr-00211-TJC-TBT-1 Docket entry No. 128, at 8; Pet. App. 4a. If he had transferred ownership before being adjudicated guilty, Section 922(g)(1) would have presented no bar.[9]

---

[9] In the courts below, petitioner suggested that he could not have transferred the firearms before his guilty plea because they "secured" his bond. J.A. 128 (stating that selling or transferring the firearms before being adjudicated guilty was "impossible" because

In short, the basic premise of petitioner's argument is that the court of appeals incorrectly held that a convicted felon effectively loses his ownership rights in firearms because he is categorically barred from transferring them to a third party or receiving any financial benefit from their sale. But the court of appeals did not categorically rule out all such relief; it rejected only the specific type of relief that petitioner requested.

D. The District Court Was Not Required To Grant Petitioner's Request That His Firearms Be Transferred To His Wife Or To Rosier

Given the relief requested in petitioner's motion—that his firearms collection be transferred to his wife or to his good friend Rosier—the district court acted within its discretion when it denied the motion. A court exercising equitable discretion is not required to allow a convicted felon to control the disposition of his firearms or to accept the risk that he may continue to have control over the firearms after they are released. See *Quackenbush*, 517 U.S. at 718 (noting the "historic discretion exercised by federal courts 'sitting in equity'") (citation omitted); cf. *Howell*, 425 F.3d at 974

"[g]enerally, one cannot pass good title to property that is securing a bond or the bond would be meaningless"); J.A. 188 (stating that "[f]rom the moment I delivered the Collection[,] the property was encumbered with the bond and deprived me of my ability to sell or dispose of the property"). That is incorrect. Surrendering his law enforcement firearm and credentials was one condition of petitioner's release on bond (J.A. 34); a separate condition of his release was the requirement that petitioner execute a secured bond in the amount of $20,000 (J.A. 33). The bond was secured with petitioner's salary from his former job as a United States Border Patrol agent, not with any firearms, and certainly not with firearms that petitioner voluntarily turned over to the FBI. See J.A. 26-28, 34.

("A motion to return seized property under Fed. R. Crim. P. 41(g)[] is a motion in equity, in which courts will determine all the equitable considerations in order to make a fair and just decision."); *Zaleski*, 686 F.3d at 92 (a motion for return of property is available only when the equities favor the exercise of jurisdiction).

Equitable jurisdiction must be exercised "with caution and restraint" and is appropriate only when necessary to "prevent manifest injustice" in light of the movant's conduct and his request. *Eubanks*, 169 F.3d at 674. The district court's decision to deny equitable relief is reviewed only for an abuse of discretion. *Shigemura*, 664 F.3d at 312; *Mochado*, 465 F.3d at 1307. Based on the specific relief insisted upon by petitioner in the district court, it was not an abuse of discretion for the court to deny his motion.

1. First, petitioner's requested relief would have allowed him to control who next had access to the firearms. Petitioner insisted before the magistrate judge that the firearms be transferred to his wife, to Rosier, or to "any other person of [petitioner's] choosing." J.A. 161; see J.A. 40, 73; cf. J.A. 106-107 (petitioner's claim submitted to the FBI stating that if the firearms were not released to Rosier, petitioner would retain his "right to transfer [his] interest to a person of [his] choosing"). Granting such relief would have resulted in constructive possession, in violation of Section 922(g)(1). See pp. 23-26, *supra*.

2. Second, even if the Court were to conclude that permitting a convicted felon to select the next recipient of his firearms does not amount to constructive possession, petitioner's requested relief did not sufficiently ensure that petitioner would not continue to

have control over the firearms. "Whether a particular proposed arrangement would constitute prohibited constructive possession [is] an issue of fact to be determined by the [court]." *Zaleski*, 686 F.3d at 93.

a. Although it appears that petitioner no longer seeks to have his firearms transferred to his wife, see Pet. Br. I (asking whether a felony conviction prevents a court from ordering the government to "transfer non-contraband firearms to an unrelated third party to whom the defendant has sold all his property interests"), that request made to the district court encompassed a significant risk that petitioner would regain possession of the firearms. Petitioner has never suggested that he and his wife do not live together, and petitioner offered no assurances from his wife that the firearms would be kept in a location over which petitioner could not exercise dominion or control. Proof that a firearm is found in an area of a shared residence over which the convicted felon has dominion and control is sufficient to establish constructive possession. See, *e.g.*, *United States* v. *Alanis*, 265 F.3d 576, 592 (7th Cir. 2001), cert. denied, 535 U.S. 1095 (2002); *Meza*, 701 F.3d at 419-420.

b. Furthermore, with respect to either of the selected recipients, it was not clear that petitioner was actually offering to give up control over his firearms collection. Petitioner had previously sought to have the firearms transferred to his next-door neighbor Boggs, who decided he did not want to "become involved" in petitioner's plan when he was contacted by the FBI. J.A. 85, 150-151. Before the district court, petitioner tried to have the firearms transferred to his wife or to his good friend Rosier, but neither of those selected recipients offered any assurances that they

would not return the firearms to petitioner or follow his instructions (Rosier did not even attend the hearing). J.A. 117, 140.

The absence of any assurances was especially conspicuous given that the "bill of sale" purporting to transfer the firearms to Rosier did not indicate that Rosier had agreed to pay any money to petitioner for his collection—an omission that did not go unnoticed by the magistrate judge, J.A. 87-89, 162-163; and also given petitioner's repeated statements that many of the firearms were received by inheritance and were suppposed to be given to petitioner's children, see J.A. 161 (requesting that the firearms be given to petitioner's wife "for the benefit of [petitioner's] adult children and heirs"); J.A. 40, 73 (same); J.A. 159 (petitioner's testimony that "[t]he firearms have been owned by my family and me for many years" and that "[m]any were given to me by inheritance, trading and buying from family members, friends, co-workers and other law enforcement officers"); cf. J.A. 178 (petitioner's appellate brief stating that petitioner had "inherited several rifles and guns from [his father] which were to be passed on to [petitioner's] son, stepson and daughter from their grandfather").

That petitioner offered no assurances from his wife or from Rosier that they would not allow petitioner to have further control over the firearms was sufficient grounds for the district court to deny petitioner's motion. Courts that have discussed the possibility that a convicted felon could designate a third party to receive his firearms have stated that assurances are an important part of such an arrangement. See *Miller*, 588 F.3d at 420 (stating that firearms could be given to a friend or relative "conditioned on the recip-

ient's written acknowledgement that returning the guns to [the felon] or honoring his instructions would aid and abet [the felon's] unlawful possession"); *Zaleski*, 686 F.3d at 93 (stating that transfer to a federal firearms licensed dealer selected by the defendant would be appropriate if the dealer is "a suitable custodian not subject to [the defendant's] control"); cf. *State* v. *Fadness*, 268 P.3d 17, 30 (Mont. 2012) (concluding that "even if the [d]istrict [c]ourt had concluded that [the defendant] would *not* have constructive possession of his weapons upon their release * * * , the court was not then obligated to adopt that disposition" and could instead order the firearms sold for the defendant's account). Petitioner does not contend, nor could he, that any assurances were offered to the district court. He asserts in his brief (Pet. Br. 25) that "[a]llowing felons to transfer their non-possessory interests to lawful purchasers poses no risk of putting firearms back in felons' hands." But no court has adopted that view in a case where the convicted felon is allowed to select the purchaser.

A court that is exercising "caution and restraint" to ensure that it is not facilitating a violation of Section 922(g)(1) is not required to allow a convicted felon to control the disposition of his firearms. *Eubanks*, 169 F.3d at 674. At the very least, the court is not required to comply with a convicted felon's insistence that the firearms be transferred to his selected recipients without any offer of assurances that they would not be subject to his further control. In light of petitioner's specific request, an exercise of the court's equitable jurisdiction was not necessary to "prevent manifest injustice." *Ibid.*

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 18 U.S.C. 922 provides in pertinent part:

Unlawful acts

* * * * *

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien—

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(h) It shall be unlawful for any individual, who to that individual's knowledge and while being employed

for any person described in any paragraph of subsection (g) of this section, in the course of such employment—

(1) to receive, possess, or transport any firearm or ammunition in or affecting interstate or foreign commerce; or

(2) to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

2. 18 U.S.C. 924(d)(1) provides:

Penalties

Any firearm or ammunition involved in or used in any knowing violation of subsection (a)(4), (a)(6), (f), (g), (h), (i), (j), or (k) of section 922, or knowing importation or bringing into the United States or any possession thereof any firearm or ammunition in violation of section 922(*l*), or knowing violation of section 924, or willful violation of any other provision of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, or any firearm or ammunition intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1986 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions

of this chapter: *Provided*, That upon acquittal of the owner or possessor, or dismissal of the charges against him other than upon motion of the Government prior to trial, or lapse of or court termination of the restraining order to which he is subject, the seized or relinquished firearms or ammunition shall be returned forthwith to the owner or possessor or to a person delegated by the owner or possessor unless the return of the firearms or ammunition would place the owner or possessor or his delegate in violation of law. Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.

3. 41 C.F.R. 101-42.1102-10 provides:

Special requirements for utilization, donation, sale, and abandonment or destruction of hazardous materials and certain categories of property.

Firearms.

(a) *Utilization requirements.* (1) In accordance with § 101-43.4801(c) of this chapter, reports of excess reportable firearms and requests for their transfer must be submitted to the:

General Services Administration (7FP-8), Denver, CO 80225-0506.

(2) Firearms may be transferred only to those Federal agencies authorized to acquire firearms for official use. Such transfers must be executed under § 101-43.309-5 of this chapter and, when applicable,

§ 101-42.1102-8(b). Additional written justification from the requesting agency may be required.

(b) *Donation requirements.* (1) Only handguns, rifles, shotguns, and individual light automatic weapons, all less than .50 caliber in FSC 1005, and rifle and shoulder fired grenade launchers in FSC 1010, assigned a disposal condition code of 4 or better, as defined in § 101-43.4801(e) of this chapter, may be offered by GSA (7FP-8) to State agencies for donation to eligible law enforcement entities for law enforcement purposes only. Donations are limited to only those eligible law enforcement entities whose primary function is the enforcement of applicable Federal, State, and/or local laws, and whose compensated law enforcement officers have powers to apprehend and arrest. Such donations must be executed under § 101-42.1102-8(c) as applicable.

(2) Each SF 123 submitted to GSA must be accompanied by a conditional transfer document, signed by both the intended donee and the State agency, and containing the special terms, conditions, and restrictions prescribed by GSA, and any other required forms or information.

(3) The restrictions on donated firearms shall be in perpetuity, and they may not be released by the State agency without prior written approval from GSA. The donee must notify the State agency when donated firearms are no longer needed. The State agency may, with GSA approval, reassign firearms from one donee to another donee within the state or to another SASP (see § 101-44.205(f) of this chapter); otherwise,

firearms must be delivered directly to the place of destruction to be destroyed by either the donee or the State agency. Destruction must be such that each complete firearm is rendered completely inoperable and incapable of being made operable for any purpose except for the recovery of basic material content in accordance with paragraph (c) of this section. The donee and a representative from the State agency, or designee, must both state in writing that the firearms were so destroyed and the original signed statement must be maintained by the State agency.

(4) Surplus firearms approved for donation must be shipped or transported directly from the holding Federal agency to the donee, and may not be stored in the State agency warehouse; or, arrangements may be made by the State agency for the designated donee to make a direct pickup at the holding agency.

(5) Firearm ammunition may not be donated.

(c) *Sales requirements.* Surplus firearms may be sold only for scrap after total destruction by crushing, cutting, breaking, or deforming to be performed in a manner to ensure that the firearms are rendered completely inoperative and to preclude their being made operative. Such sale shall be conducted under subpart 101-45.3.

(d) *Foreign gifts of firearms.* Firearms reported to GSA as foreign gifts may be offered for transfer to Federal agencies, including law enforcement activities. Foreign gifts of firearms shall not be donated. Such gifts not required for Federal use may be sold only to the gift recipient at the discretion of GSA. A certifi-

cation that the purchaser shall comply with all State and local laws regarding purchase and possession of firearms must be received by GSA prior to release of such firearms to the purchaser. Firearms not transferred to a Federal agency or sold to the recipient shall be disposed of in accordance with paragraph (c) or (e) of this section.

(e) *Abandonment and destruction of firearms.* Firearms shall not be abandoned. Destruction of firearms is subject to the requirements set forth in paragraph (c) of this section. Such destruction shall also be accomplished under the provisions of subpart 101-45.9, § 101-42.406 and, when applicable, § 101-42.1102-8.

(f) *Abandoned and forfeited firearms.* In addition to the requirements of this part 101-42, forfeited or voluntarily abandoned firearms shall be subject to the provisions of part 101-48.

4. 41 C.F.R. 128-48.102-1 provides:

Vesting of title in the United States.

(a) Abandoned or other unclaimed property, subject to the provisions of section 203(m) of the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 484(m)), shall remain in the custody of and be the responsibility of the bureau finding such property.

(b) If the owner of such property is known, the owner shall be notified within 20 days of finding such property by certified mail at the owner's address of

record that the property may be claimed by the owner or his designee and that if the property is not claimed within 30 days from the date the letter of notification is postmarked, the title of the property will vest in the United States.

(c) If the owner of such property is not known and the estimated value of the property exceeds $100, the bureau shall post notice within 20 days of finding such property, which contains the following information:

(1) A description of the property including model or serial numbers, if known.

(2) A statement of the location where the property was found and the office that has custody of it.

(3) A statement that any person desiring to claim the property must file with the bureau within 30 days from the date of first publication a claim for said property.

(4) A complete mailing address is to be provided as a point of contact within the bureau for any person to obtain additional information concerning the property or the procedures involved in filing a claim.

Notice must be published once a week for at least three successive weeks. Sound judgment and discretion must be used in selecting the publication medium. Advertisements should be placed in a publication of general circulation within the judicial district where the property was found.

(d) Property, as described in paragraphs (b) and (c) of this section, shall be held for a period of 30 days

from the date of the first publication of notice. Upon the expiration of this 30-day period, title to such property vests in the United States, except that title reverts to the owner where a proper claim is filed within three years from the date of vesting of title in the United States, but if the property has been in official use, transferred for official use, or sold at the time the proper claim is approved, title shall not revert back to the former owner. The former owner shall instead obtain reimbursement in accordance with 41 CFR 101-48.102-4 or 101-48.305-1.

(e) If the owner of such property is unknown and the estimated value of the property is $100 or less, no notice is required, and the property shall be held for a period of 30 days from the date of finding the property. Upon expiration of this 30-day period, title to such property vests in the United States.

REPLY BRIEF

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No. 13-1487

In the Supreme Court of the United States

TONY HENDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES III

I. THE GOVERNMENT REWRITES THE HOLDING BELOW IN AN EFFORT TO SAVE IT 1

II. A FELON'S NOMINATION OF A THIRD PARTY TO RECEIVE HIS OWNERSHIP INTERESTS, SUBJECT TO COURT APPROVAL, DOES NOT CONSTITUTE CONSTRUCTIVE POSSESSION 10

CONCLUSION 18

TABLE OF AUTHORITIES

Cases: **Page(s)**

Ball v. *United States*, 470 U.S. 856 (1985) 15

Castro v. *United States*, 540 U.S. 375 (2003) 9

Cellino v. *United States*, 276 F.2d 941 (9th Cir. 1960) 14

Fed. Express Corp. v. *Holowecki*, 552 U.S. 389 (2008) 9

Hughes v. *Rowe*, 449 U.S. 5 (1980) (per curiam) 9

Lucero v. *United States*, 311 F.2d 457 (10th Cir. 1962) 14

Small v. *United States*, 544 U.S. 385 (2005) 10

Sylla v. *Ruh*, No. CV 10-3325(JFB)(GRB), 2012 WL 4370187 (E.D.N.Y. Aug. 30, 2012) 9-10

United States v. *Al-Rekabi*, 454 F.3d 1113 (10th Cir. 2006) 13

United States v. *Felici*, 208 F.3d 667 (8th Cir. 2000) 3, 4

United States v. *Hood*, 507 F. App'x 859 (11th Cir. 2013) 13

United States v. *Hougham*, 364 U.S. 310 (1960) 16

United States v. *Howell*, 425 F.3d 971 (11th Cir. 2005) .....*passim*

United States v. *Malfi*, 264 F.2d 147 (3rd Cir. 1959) 14

United States v. *Manzella*, 791 F.2d 1263 (7th Cir. 1986) 15

Cases - Continued: **Page(s)**

United States v. *Miller*, 588 F.3d 418 (7th Cir. 2009) 3, 4, 8

United States v. *Nungaray*, 697 F.3d 1114 (9th Cir. 2012) 13

United States v. *Virciglio*, 441 F.2d 1295 (5th Cir. 1971) 13

United States v. *Wilkes*, 451 F.2d 938 (2d Cir. 1971) 14

United States v. *Zaleski*, 686 F.3d 90 (2d Cir. 2012) 3, 4

Statutes, Rules, and Regulations:

18 U.S.C. § 922(g) ..... *passim*

40 U.S.C. §102(10) 16

41 C.F.R. § 101-42.1102.10 16

41 C.F.R. § 102-41.45 16

41 C.F.R. § 102-41.80 16-17

41 C.F.R. § 102-41.175 17

41 C.F.R. § 102-41.195 16

Federal Property and Administrative Services Act of 1949, Pub. L. No. 81-152, 63 Stat. 377 16

Fed. R. Crim. P. 41(g) 2, 17

Miscellaneous:

Frederick C. Benson, Comment, *The Firearm-Disability Dilemma: Property Insights into Felon Gun Rights*, 80 U. Chi. L. Rev. 1231 (2013) 3

Black's Law Dictionary (10th ed. 2014) 15

REPLY BRIEF FOR THE PETITIONER

I. THE GOVERNMENT REWRITES THE HOLDING BELOW IN AN EFFORT TO SAVE IT

The government protests—too much—that "the court of appeals did not hold that convicted felons effectively lose their ownership interest in firearms or are categorically barred from realizing any value from their sale." U.S. Br. 30. It insists instead that the lower courts merely "evaluated the specific relief requested by petitioner and concluded that such relief was not warranted." *Id.* at 28. On the government's reading, one wonders why this Court granted review.

The courts below, however, held exactly what the government now denies they did. They both held *categorically* that a felon cannot transfer his non-possessory interests in his firearms—or even benefit from their sale through a third party. The district court denied petitioner's motion to transfer the firearms simply "because Mr. Henderson was a convicted felon," Pet. App. 2a, reasoning that "allowing a defendant to transfer the firearms or receive money from their sale would be constructive possession" prohibited by 18 U.S.C. § 922(g), Pet. App. 12a; *id.* at 5a (adopting Report and Recommendation). And the Eleventh Circuit affirmed "because Mr. Henderson cannot possess firearms as a convicted felon[] and because he seeks equitable relief with unclean hands." *Id.* at 4a. In its legal analysis, neither court relied upon or indeed even mentioned the mechanics of the particular transaction or the identities of the purchasers. See *id.* at 3a-4a, 11a-14a. One sentence from the magistrate judge is enough to expose the government's rebranding initiative for what it is: "[A]s

[the government] cited, the *Howell* case * * * clearly says that a convicted felon cannot * * * get the sale [*sic*] or distribution of the proceeds for the weapons should they be sold." J.A. 172-173.

The Eleventh Circuit's categorical holding is unsurprising, if wrong. Contrary to the argument the government makes for the first time before this Court, see U.S. Br. 30-31, *United States* v. *Howell*, 425 F.3d 971 (11th Cir. 2005), the controlling circuit precedent, required such an approach. *Howell* specifically denied a felon's request for the court to arrange to "sell [his] firearms and distribute the proceeds to him,"[1] *id.* at 977, the one remedy the government now argues that the Eleventh Circuit allows and that cures all constitutional difficulties. Other courts of appeals, academic commentators, and, indeed, the government itself in this and other cases have also recognized that the Eleventh and Eighth Circuits' rules work categorically in exactly the way the government now tries to deny. See pp. 3-5,

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[1] The government tries to obscure this fact by suggesting that *Howell* rejected the felon's proposed third-party sale for a different reason: because it "was 'beyond the scope of Rule 41(g),'" which "'deals solely with the return of property.'" U.S. Br. 30-31 (quoting *Howell*, 425 F.3d at 977). This will not do. The government manufacturers this "holding" by stringing together two unrelated quotations separated by over 230 words. See *Howell*, 425 F.3d at 977. The meaning of the first clause, that selling the firearms would be "beyond the scope of Rule 41(g)," is made clear by the sentence that immediately follows it: "We agree with the Eight[h] Circuit in concluding that any firearm possession, actual or constructive, by a convicted felon is prohibited by law." *Ibid.* In other words, *Howell* held that a sale is "beyond the scope of Rule 41(g)" not because that particular rule "deals solely with the return of property," but because "sell[ing] the firearms and distribut[ing] the proceeds to [the felon]" would somehow cause him to "possess the three seized firearms constructively." *Id.* at 976-977.

infra. Like the courts below, they all read *Howell* as barring *any* transfer or sale to a third party because constructive possession would attach to the felon in violation of § 922(g).

To begin with, other courts of appeals have uniformly construed the Eighth and Eleventh Circuits to categorically bar felons from transferring firearms, even through a government-arranged sale. In *United States* v. *Miller*, the Seventh Circuit read both *Howell* and *United States* v. *Felici*, 208 F.3d 667 (8th Cir. 2000), the Eighth Circuit precedent *Howell* followed, see 425 F.3d at 976-977, as "conclud[ing] that the United States is not obliged to confer a benefit on a felon by selling guns as his agent, and that any other [proposed] approach would permit the felon to maintain unlawful possession of the weapons." 588 F.3d 418, 419 (7th Cir. 2009). The Second Circuit adopted that same reading of *Howell* and *Felici* in rejecting it on the merits. In *United States* v. *Zaleski*, 686 F.3d 90, 92-93 (2d Cir. 2012), it "contrast[ed] the Seventh Circuit['s] * * * suggest[ion] that a convicted felon may devise an arrangement in which he recovers the value of the seized firearms" with the Eighth and Eleventh Circuits' position that such arrangements "necessarily constitute[] constructive possession by the felon."

The academic commentary agrees. One commentator, for example, describes *Howell* and *Felici* as "refus[ing] to recognize *any* residual[, non-possessory property] rights" in the felon, Frederick C. Benson, Comment, *The Firearm-Disability Dilemma: Property Insights into Felon Gun Rights*, 80 U. Chi. L. Rev. 1231, 1248 (2013) (emphasis added), and contrasts those cases with *Zaleski* and *Miller*, which do "recognize convicted felons' firearm property rights," *id.* at 1245-1248.

Most tellingly, until it filed its brief on the merits in this case, the government *itself* had consistently argued that the Eighth and Eleventh Circuits categorically bar felons from transferring firearms to any third party even through a government-arranged sale. In *Miller*, for example, the government argued that *Howell* foreclosed having "guns be given to a relative in trust *or sold on the defendant's behalf*" and that the "alternatives proposed amounted to constructive possession, which is * * * prohibited." Gov't C.A. Br. at 8, *Miller*, 588 F.3d 418 (No. 09-2256), *available at* http://goo.gl/fdLIAv (emphasis added).

Given the government's representation to this Court that the Eleventh Circuit's rule does not bar having licensed firearms dealers oversee a sale for the felon's benefit, U.S. Br. 19-21, one might expect the government to accommodate such requests. Not so. In *Zaleski*, the government fought such a request arguing to the Second Circuit that the defendant was "not entitled to have the weapons transferred to * * * *any* * * * third party—whether to be held in trust for him, or to be sold for his benefit—because such circumstances would amount to constructive possession." Gov't C.A. Br. at 77, *Zaleski*, 686 F.3d 90 (No. 11-660(L)), *available at* http://goo.gl/XGOU2W. The government claimed there that *Howell* and *Felici* "held" that having "an agent * * * sell § 922(g) items would [impute] constructive possession" to the defendant. *Ibid.* It argued that *Howell*, *Felici*, and other cases so completely extinguished the gun owner's property interests that the government could only "dispose of [Zaleski's firearms by destruction] upon Zaleski's conviction becoming final." *Ibid.*

More revealingly still, the government argued to both courts below that *Howell* categorically barred them from ordering a third-party sale of the firearms for petitioner's benefit. At the motion hearing, the government summarized its position as follows:

> [A]fter Mr. Henderson was adjudicated guilty in 2008 * * * he *lost all rights to do anything* with respect to the transfer of these weapons. By doing so, he would have been exercising constructive possession of the weapons. * * * [H]e doesn't sit in a position to be able to do *anything* with respect to the ownership of the firearms.

J.A. 169-170 (emphasis added). Before the Eleventh Circuit, the government pressed a similarly categorical view of *Howell*, stating that petitioner's eligibility for relief "hinged on [his] status as a convicted felon," Gov't C.A. Br. 13, *available at* http://goo.gl/OrjOS0, not on the details of the proposed sale, the transferee's status as a licensed firearms dealer, or whether he was subject to petitioner's influence. Such arguments were conspicuously absent until the government filed its merits brief in this Court. To conclude that the lower courts "evaluated [and rejected only] the specific relief requested by petitioner," U.S. Br. 28, would require one to conclude that both courts below based their decisions on grounds that the parties did not argue and that the courts themselves did not bother to articulate.

That the government is unwilling to defend the Eleventh Circuit's *actual* rule is reason enough to discredit it.[2] In order to rewrite the holding below, however,

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[2] The government likewise fails to defend the Eleventh Circuit's alternative holding that "a defendant convicted of a drug offense has unclean hands to demand the return of firearms, even if the firearms

the government had to rewrite the relief petitioner requested as well. According to both the government and its amicus, the only relief considered below was a request to transfer petitioner's firearms to his wife, Mr. Rosier, a "family man" in his "early 70s," who lived far away in St. Augustine, whom petitioner had met through "a highway patrol friend," J.A. 162, or to any other person who could lawfully own them.[3] U.S. Br. 28-30; Brady Center

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were not used in furtherance of the offense." U.S. Br. 31 n.8. Instead, it merely states in a footnote that it "does not rely on that argument as a basis for affirming the court of appeals' decision." *Ibid.* Its failure to "rely on that argument" is, however, just a polite euphemism for its failure to defend it. To the extent the government means to confess error on this point, petitioner accepts. To the extent the government means to suggest that this Court can or should decide the case without addressing the unclean hands holding, it is mistaken. Even if the government disavows reliance on the holding in this particular case, this Court should reject it for the same reason the government disclaims it: It is indefensible. Unless this Court reverses the alternative holding, moreover, petitioner and people like him in the Eleventh Circuit would not be able to take advantage of the government's new position that a court could order a sale by a licensed dealer for the owner's benefit. Their unclean hands would bar them from equity.

The government tries to further obscure the significance of the alternative holding by claiming that "[t]his case does not present the question whether a court of equity could decline to provide relief in derivative contraband cases—i.e., cases involving property that is not contraband *per se*, but that had become forfeitable because of unlawful use." U.S. Br. 31 n.8. This is true but irrelevant. The case squarely presents an even more important question: whether a court in equity can decline to provide relief in *non*-contraband cases. As the district court held, the Eleventh Circuit's rule in *Howell* barred any transfer or sale even though the firearms "were neither seized from Henderson, nor constituted contraband, nor were they forfeited." Pet. App. 13a-14a (footnote omitted).

[3] The government states that "it was not clear that petitioner was actually offering to give up control over his firearms collection." U.S.

Amicus Br. 10. This construes the relief petitioner requested too narrowly. Although in his district court filings petitioner did ask for transfer to his wife or Mr. Rosier, J.A. 40 (Motion to Return/Disposition of Property); J.A. 73 (Renewed Motion to Return/Disposition of Property), in the paragraph that precedes that request in each document he pointed to the possibility of other remedies that courts had developed: "Courts have fashioned solutions that preclude convicted felons from unilaterally dictating or directing disposition of their lawfully owned firearms while avoiding the serious constitutional issues under the *Takings Clause* while protecting the felon-owner's legitimate property interests." J.A. 40, J.A. 72-73. At the motion hearing, moreover, he pointed in particular to the possibility of a

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Br. 36. It notes that there were "no assurances from his wife or from Rosier that they would not allow petitioner to have further control over the firearms," *id.* at 37, an "absence [that] was especially conspicuous [in Rosier's case] given that the 'bill of sale' purporting to transfer the firearms to Rosier did not indicate that Rosier had agreed to pay any money to petitioner for his collection," *ibid.* Nothing in the record indicates that petitioner would retain any control after the transfer. No assurances were made because none was requested. As explained, the district court understood that *Howell categorically* barred petitioner from transferring his firearms, see pp. 1-2, *supra*. Since it believed it had no discretion to order the transfer, any assurances would have been futile and the court asked for none.

No amount of money was agreed upon because Mr. Rosier had never seen the firearms. When the magistrate judge noted that "the bill of sale * * * does not indicate [Mr. Rosier] paid you anything for the firearms," J.A. 162-163, petitioner explained: "He was going to get the firearms, look the firearms over, if he felt like he needed to have an appraisal or – go from there, and then we would decide on what would be transferred, as far as funds," J.A. 163. The government's possession of the firearms made inspection and any agreement as to price before the transfer impossible.

"sale": "circuits have held [that t]he owner continues to have a property interest in the firearms, which must be accommodated by the *sale*, transfer, or storage of the firearms." J.A. 170 (emphasis added). He even went so far as to cite *Miller*, the first court of appeals case to approve a government-managed sale. *Ibid.* He concluded by noting that "[t]he courts have fashioned [various] solutions. * * * And, Your Honor, I'm here pro se. I'm not an attorney. So that's – I presented the facts of the case and everything I have in this. And that's the best I can do." J.A. 172.

In the court of appeals, petitioner, still representing himself, detailed exactly what these "solutions" could include. "The 7th Circuit [has] held," he noted, that "if the United States does not want to sell firearms for the felon's benefit, * * * it must offer him some other lawful option: having a trustee sell or hold the guns, or giving them to someone who can be relied upon to treat them as his own." J.A. 189. And he also pointed out that in the Second Circuit a "felon may arrange to benefit from the sale of otherwise lawful, unforfeited firearms by a third party." J.A. 190. He summed up by applying these alternatives to his own case:

> The court can order the transfer of title to the [firearms] and order a sale for my account. U.S. v. Miller, 588 F.3d at 419. * * * I am not setting the value, directing the sale or purchase of the firearms, but am merely compensated for the value of my property by a neutral third-party, subject to any commission for such sale. The court can set such conditions as it deems necessary. See U.S. v. Rodriguez, 2011 U.S. Dist. LEXIS 133109, at *54. Finally, the court can allow me to designate a third-

> party who can lawfully take possession of the [firearms] and treat t[hem] as his own.

J.A. 193-194. Petitioner thus put many more options before the courts than just transfer to his wife or to Mr. Rosier.

The government's pinched reading of the scope of relief requested is particularly inappropriate since petitioner was proceeding pro se. "[D]ocuments filed by pro se litigants are to be liberally construed." U.S. Br. as Amicus Curiae Supp'g Resp'ts at 20 n.11, *Fed. Express Corp.* v. *Holowecki*, 552 U.S. 389 (2008) (No. 06-1322) (quotation marks and original alterations omitted) (collecting authorities), *available at* http://goo.gl/f4clNg. "Federal courts sometimes will ignore the legal label that a *pro se* litigant attaches to a motion and recharacterize the motion in order to place it within a different legal category," *Castro* v. *United States*, 540 U.S. 375, 381 (2003), and generally will not deny relief "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," *Hughes* v. *Rowe*, 449 U.S. 5, 10 (1980) (per curiam). Indeed, this principle has

> particular force in the context of actions relating to seized property. Such actions, which inhabit a nebulous and mutable intersection of criminal prosecution and civil claims, are fraught with complexities, including constitutional doctrines, jurisdictional issues, and the arcane procedures of administrative, civil and criminal forfeiture. As such, when considering a *pro se* plaintiff's effort to recover seized property, it would appear that additional latitude should be afforded.

Sylla v. *Ruh*, No. CV 10–3325(JFB)(GRB), 2012 WL 4370187, at *2 (E.D.N.Y. Aug. 30, 2012).

II. A FELON'S NOMINATION OF A THIRD PARTY TO RECEIVE HIS OWNERSHIP INTERESTS, SUBJECT TO COURT APPROVAL, DOES NOT CONSTITUTE CONSTRUCTIVE POSSESSION

In its merits brief, the government for the first time explains its theory of why transfer of a felon's *non-possessory* interests in his firearms imputes constructive *possession* to him. It argues that "allowing the felon to select the first recipient of the firearms gives him control over them." U.S. Br. 24. This argument overstates the felon's role in the transaction. He cannot "select" the recipient. The most he can do is *nominate* one for the court to consider for approval subject to whatever reasonable conditions it considers appropriate. The court alone "control[s]," *ibid.*, the transaction. Although the government suggests that petitioner's favored position would permit "a gang leader * * * convicted of a felony [to] *require* the court to order his firearms transferred to fellow gang members," *id.* at 25 (emphasis added), equity gives the judge broad discretion to reject a felon's nominees and impose reasonable conditions on any suitable recipient it selects.

The government's focus on the transferee's ability to nominate a recipient also lacks any basis in law or logic. Under the government's theory, a felon could not seek to assign his ownership interests to the *government itself*, for the act of designation would give him sufficient "control" to establish constructive possession. But surely a law whose purpose is to keep guns out of the hands of dangerous people, see *Small* v. *United States*, 544 U.S. 385, 393 (2005), would not entail such a result. It would

focus on the identity of the recipient, which is subject to judicial supervision, and not on the act of nomination.

Indeed, it is hard to see why the government's favored remedy, which it proposes for the first time before this Court, would not create the same difficulties it sees in petitioner nominating "the first recipient," U.S. Br. 24. If the mere act of "allowing the felon to select the first recipient of the firearms [is what] gives him control over them," *ibid.*, why should it matter that the recipient is a licensed dealer? The government's favored remedy would also perversely have the very effect the government claims to fear. If the defendant nominates a "fellow gang member[]," *id.* at 25, to receive his firearms, the prosecution will vigorously oppose the choice and a court would certainly reject it. By contrast, simply giving the guns to a licensed dealer would permit their sale to the first buyer able to clear the requisite background check, even if he is a friend or close associate of the former owner or even a "fellow gang member[]." Nominating a recipient subject to court approval gives the government, in fact, *more* control over the ultimate recipient than the government's preferred alternative. Such a procedure permits the government and the court to focus their inquiry on whether the nominated recipient is an appropriate custodian for the firearms and whether the owner can control or influence him.

The government's theory would likewise criminalize a felon's directing by will that upon his death his firearms pass to his heirs as part of his estate. But it is difficult to see how designating a beneficiary after one's death would entail possession—actual or constructive—in any sense, let alone the sense that gave rise to § 922(g). Until the testator's death, the government, who has seized (or received) the firearms from the criminal defendant

enjoys possession; after it, his beneficiary does. At all times, the firearms are out of the felon's hands.

These odd implications of the government's rule reflect how the government plays with the notion of "control." Although a dying man may exercise "control" when he chooses which niece or nephew gets an oil painting in his will, such "control" does not impute constructive possession to him, especially if he has given a museum the right to house and display the work until his death.

These difficulties expose the underlying flaw in the government's argument. In cases like these, constructive possession does not turn on one's ability to help the court "select[] the next recipient [of property] and [help] control[its] destination." U.S. Br. 13. Rather, it hinges on the owner's ability to control how the recipient uses the property. It focuses, in other words, on the relationship between the owner and the recipient. Or, as the government itself puts it, constructive possession "allows the law to reach beyond puppets to puppeteers." *Id.* at 19 (quoting *United States* v. *Al-Rekabi*, 454 F.3d 1113, 1118 (10th Cir. 2006)). Nominating a recipient whom the government can scrutinize and challenge and who will assume ownership only upon a court's finding of suitability does not create a "puppet." Pre-existing relationships of control and influence do. The inquiry should turn, then, on the relationship between the owner and the proposed recipient, not on the mechanics of the transfer.

The cases the government and its amicus cite support this view. The government is far off the mark in claiming that these cases base "constructive possession * * * on the defendants' ability to control the destination of the firearms." U.S. Br. 26. For starters, simply nominating

a transferee subject to court approval falls far short of "control[ling] the destination of the firearms," *ibid.* See p. 10, *supra*. The government's cases, moreover, all involve defendants who participated pervasively in the transaction and controlled the physical movement and delivery of the guns. In *United States* v. *Nungaray*, 697 F.3d 1114, 1117 (9th Cir. 2012), for example, the court noted that the defendant "controlled the sale * * * from start to finish[,] demonstrated his * * * power and intent to control [the guns,] set[] the delivery location, [and] could and did assure delivery of the guns." It also noted that the district court had found that the defendant "[wa]s present at the sale[and] direct[ed] another person to physically pick up the firearms and deliver them physically into the trunk of the purchaser." *Id.* at 1116. Likewise in *United States* v. *Hood*, 507 Fed. App'x 859, 861 (11th Cir. 2013), the defendant on seven different occasions directed "his 'boys'" to bring guns to a sale he had "arranged" and to hand those guns over to the purchasers before he himself accepted payment for the transaction. In *United States* v. *Virciglio*, 441 F.2d 1295, 1297 (5th Cir. 1971), the defendant had the machine gun brought physically to his house, allowed the buyer to examine it in the defendant's truck, and "got half the money." As the government's own authority recognizes, it is the relationship between the defendant and those who have actual possession of the firearms that is critical: "Some objective evidence of an appreciable or demonstrable ability to control the acts of another is necessary. Included among the possibilities might be coercion or a financial, contractual, familial or other relationship." *Al-Rekabi*, 454 F.3d at 1120 n.6. Nominating as a recipient someone over whom the owner has no control or influence in no way establishes the owner's constructive possession.

The much older *drug*-possession cases cited by the government's amicus, Brady Center Amicus Br. 7-8, also focus on the constructive possessor's ability to control and influence the overall drug transaction and those who have actual possession of the drugs. In *United States* v. *Malfi*, 264 F.2d 147, 149, 150 (3d Cir. 1959), for example, the defendant indicated that "as soon as *he got the heroin* he would deliver it to [an intermediary who] would deliver it" to the purchasers, which he did, and upon complaints of slow service, he ensured that the intermediary made the delivery. At the least, the defendant controlled the physical movement of the heroin by the intermediary; at the most, he himself had actual possession. In *Cellino* v. *United States*, 276 F.2d 941, 946 (9th Cir. 1960), the defendant "not only facilitated the sale[] but * * * assured * * * delivery and was present when [the intermediary] did in fact deliver the heroin." In *Lucero* v. *United States*, 311 F.2d 457, 459 (10th Cir. 1962) (emphasis added), the defendant was not only the transaction's "moving party" and able to "set the price" but also "ha[d] *control* over, and was able to assure [the quality of and] delivery of, the heroin." In *United States* v. *Wilkes*, 451 F.2d 938, 940-941 (2d Cir. 1971), the defendant "set the price" for the drugs, "had the final say as to [the] means of transfer," and "was able to assure delivery."[4] In fact, the most recent authority cited by the government's amicus makes clear that merely nomi-

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[4] The amicus claims—solely on the basis of *Wilkes*—that someone who can "set[] the price for the property, ha[s] the final say as to means of transfer, *or* [is] able to assure delivery" enjoys constructive possession. Brady Center Amicus Br. 7-8 (quoting *Wilkes*, 451 F.2d at 940-941) (emphasis added). In *Wilkes*, however, all three of these factors were present. See *Wilkes*, 451 F.2d at 941. Amicus points to no case in which a court grounded constructive possession on merely one of these factors.

nating a transferee cannot establish constructive possession.[5] That case, *United States* v. *Manzella*, 791 F.2d 1263, 1266 (7th Cir. 1986), holds that one must have "ultimate control over the" property to constructively possess it. Petitioner, of course, lacks such "ultimate control." He can nominate a recipient but the court

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[5] The amicus also argues that state laws allowing a gun owner to use certain mechanisms to transfer firearms he can no longer lawfully possess support its notion of constructive possession. Brady Center Amicus Br. 8 n.4. That is mistaken. The states make those mechanisms available in order to allow one who owns a gun but cannot possess it to transfer custody or obtain the gun's economic value through sale. They thus avoid all the constitutional difficulties of the Eleventh Circuit's rule, which allows the federal government to effectively extinguish all the owner's property rights without compensation or due process. That some states have such mechanisms shows that they, unlike the federal government, understand the constitutional problems the Eleventh Circuit's rule entails. See Pet. Br. 28-35.

The amicus's statutory argument that petitioner's "narrow understanding of 'possess[]' * * * to mean only actual, physical possession would give that term little (if any) separate meaning from 'receive' and 'store,' each of which is independently prohibited elsewhere in the statute," Brady Center Amicus Br. 9, fares no better. This argument both wildly mischaracterizes petitioner's understanding of "possess" and misunderstands what "receive" and "store" mean. Petitioner does not argue that "only actual, physical possession" counts. Constructive possession does too. But it cannot stretch as far as the government and its amicus wish. Likewise, "possess" does have "separate meaning from 'receive' and 'store.'" As this Court has noted, "a felon may possess a firearm without having 'received' it; he may have manufactured the gun himself." *Ball* v. *United States*, 470 U.S. 856, 862 n.9 (1985). And one can "store" something, which means "[t]o keep (goods, etc.) in safekeeping for future delivery in an unchanged condition," *Black's Law Dictionary* 1646 (10th ed. 2014), without "possessing" it, as in a bailment, see Pet. Br. 16-18 (noting blackletter law that during a bailment, the bailee, not the bailor, possesses the goods).

decides whether the recipient gets the firearms and under what conditions.

The government contends that it cannot sell the firearms itself because a General Services Administration (GSA) regulation providing that "[s]urplus firearms may be sold only for scrap after total destruction" would prohibit the government itself from selling petitioner's firearms on his behalf. U.S. Br. 22 (quoting 41 C.F.R. § 101-42.1102-10(c)). That regulation facially has no applicability to firearms that a private party still owns and which the government holds on his behalf because he "voluntarily surrendered" them to the agency. *Id.* at 2. That regulation was promulgated under the Federal Property and Administrative Services Act of 1949, Pub. L. No. 81-152, 63 Stat. 377, which the government has long recognized "is the statutory framework for the sale of * * * *Government* surplus property." Gov't C.A. Br. at 10 n.5, *United States* v. *Hougham*, 364 U.S. 310 (1960) (No. 24), 1960 WL 98577, at *11 n.5 (emphasis added). The statute itself deems property "surplus" only when "the Administrator determines [it] is not required to meet the needs or responsibilities of all federal agencies." 40 U.S.C. § 102(10) (2012). Because the government has no authority to put a private party's property to official use before taking title to it, see 41 C.F.R. § 102-41.45 ("[P]roperty under seizure and pending forfeiture cannot be placed into official use until a final determination is made to vest title in the Government."), property cannot be "surplus" while title still rests in a private citizen.

Indeed, the GSA regulations themselves specify that firearms are subject to disposal under the regulation the government cites *only* when they are "forfeited, voluntarily abandoned, or unclaimed." 41 C.F.R. § 102-41.195 (citing 41 C.F.R. § 101-42.1102-10); see also 41

C.F.R. § 102-41.80 ("Personal property is voluntarily abandoned when the owner of the property intentionally and voluntarily gives up title to such property and title vests in the Government."). Even with respect to *unclaimed* private property, the regulations specify that the government may conduct sales under the regulations only "after title vests in the Government." 41 C.F.R. § 102-41.175. The government cites no comparable regulation subjecting private property in its possession to similar restrictions.

* * *

The government has effectively disavowed the Eleventh Circuit's indefensible rule that a felon's unclean hands bar him from any equitable relief. The government has, moreover, *expressly* disavowed the position it has taken throughout the country and during the earlier stages of this very case—that a court-approved sale by a third party of a felon's firearms violates § 922(g). The government belatedly recognizes, as it must, that ownership entails valuable, constitutionally protected nonposssesory rights that Congress did not disturb when it enacted § 922(g) and that an equity court must protect.

The government tries to deflect attention from its last-minute changes of position by chasing tangents that are ill-considered, irrelevant to petitioner's relief, or both, including arguments that (1) the relief sought is not available under Rule 41(g); (2) the decisions below should be reinterpreted as simple and narrow exercises of equitable discretion; (3) a pro-se petitioner's failure to request with sufficient specificity a sale by a licensed dealer should bar him from relief; and (4) sale by a licensed dealer is the only permissible remedy.

At bottom, the government's arguments against petitioner's proposed remedies rest on slippery notions of "control," a concept that in some circumstances implies possession and in others does not. If someone controls the person who actually possesses property, he constructively possesses it. If, however, the government actually possesses property that someone else owns and the owner nominates a recipient for a court to approve transfer to, the owner does not constructively possess it. The government's unstated premise that all forms and degrees of control establish constructive possession proves too much. Some forms of control implicate *nonpossessory* ownership interests, something which § 922(g) by design leaves untouched.

As a sole remedy, the consolation prize the government would now give owners, a court-arranged sale through a licensed dealer, violates fundamental ownership rights. The right to dispose is itself an incident of constitutionally protected property, one that has nothing to do with § 922(g) or equity. If someone, for example, does not want his firearms to go to the highest bidder—if he wants to donate them to the NRA Museum, ensure that they are *not* sold to an animal rights or a pro-life activist, or give them to an adult niece so that they can stay in the family—and an equity court is satisfied that the transfer is not a sham, the Constitution protects his right to do so.

CONCLUSION

For the foregoing reasons and those stated in petitioner's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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v.

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE BRADY CENTER TO PREVENT GUN VIOLENCE AS *AMICUS CURIAE* IN SUPPORT OF AFFIRMANCE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. Allowing Felons To Select The Individuals To Receive Their Firearms Is Constructive Possession In Violation Of § 922(g) 5

II. The Purpose Of § 922(g) Is Best Effectuated By Prohibiting Felons From Choosing Who Receives Their Firearms 14

III. This Case Does Not Implicate The Second Amendment Because Felons Do Not Have Second Amendment Rights 18

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

Abramski v. United States, 134 S. Ct. 2259 (2014) 1

Barrett v. United States, 423 U.S. 212 (1976)..... 17

Beck v. Prupis, 529 U.S. 494 (2000) 5

Brothers v. United States, 328 F.2d 151 (9th Cir. 1964)..... 7

Cellino v. United States, 276 F.2d 941 (9th Cir. 1960)..... 8

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) 20

Clark v. Martinez, 543 U.S. 371 (2005) 21

Commonwealth v. Howard, 713 A.2d 89 (Pa. 1998)..... 12

Cooper v. City of Greenwood, 904 F.2d 302 (5th Cir. 1990)..... 11

District of Columbia v. Heller, 554 U.S. 570 (2008) 1, 4, 18, 19, 20

GenCorp, Inc. v. Olin Corp., 390 F.3d 433 (6th Cir. 2004)..... 6

Lorillard v. Pons, 434 U.S. 575 (1978)..... 9

Lucero v. United States, 311 F.2d 457 (10th Cir. 1962) 8

Mack v. United States, 326 F.2d 481 (8th Cir. 1964)..... 7

McDonald v. City of Chicago, 561 U.S. 742 (2010) 1, 19

National Safe Deposit Co. v. Stead, 232 U.S 58 (1914) 6

People v. Minch, 825 N.W.2d 560 (Mich. 2012) 12

Richardson v. Ramirez, 418 U.S. 24 (1974) 20

Rodella v. United States, 286 F.2d 306 (9th Cir. 1960) 6

Scarborough v. United States, 431 U.S. 563 (1977) 3, 9, 10, 14

Serio v. Baltimore County, 863 A.2d 952 (Md. 2004) 12

State v. Fadness, 268 P.3d 17 (Mont. 2012) 11

State v. Ludtke, 446 N.W.2d 797 (Iowa 1989) 12

United States v. Approximately 627 Firearms, More or Less, 589 F. Supp. 2d 1129 (S.D. Iowa 2008) 11

United States v. Burrell, 324 F.2d 115 (7th Cir. 1963) 8

United States v. Dillard, 376 F.2d 365 (7th Cir. 1967) 7

United States v. Ferg, 504 F.2d 914 (5th Cir. 1974) 6

United States v. Hayes, 555 U.S. 415 (2009) 1

United States v. Hernandez, 290 F.2d 86 (2d Cir. 1961) 7

United States v. Jones, 308 F.2d 26 (2d Cir. 1962) 3, 7

United States v. Malfi, 264 F.2d 147 (3d Cir. 1959) 7-8

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United States v. Parsons, 472 F. Supp. 2d 1169 (N.D. Iowa 2007)..... 12

United States v. Ramis, 315 F.2d 437 (2d Cir. 1963)..... 8

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United States v. Wilkes, 451 F.2d 938 (2d Cir. 1971)..... 3, 7

United States v. Zaleski, 686 F.3d 90 (2d Cir. 2012).....11, 18

Verizon Communications Inc. v. FCC, 535 U.S. 467 (2002) 21

CONSTITUTION, STATUTES, AND RULES

U.S. Const.:

Amend. I 20

Amend. II 4, 18, 19, 20

Firearms Owners' Protection Act, Pub. L. No. 99-308, § 102(6)(D), 100 Stat. 449, 452 (1986) 5

Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1213, 1220 5

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18 U.S.C. § 922(g)(1) 18, 20, 21

18 U.S.C. § 922(h) 9, 13

18 U.S.C. § 922(j) 9

18 U.S.C. § 924(d)(1) 9

18 U.S.C. § 925(c) 18

21 U.S.C. § 174 (1964) (repealed 1970) 6

21 U.S.C. § 841(a) 6

21 U.S.C. § 844(a) 6

26 U.S.C. § 5861 6

D.C. Code § 7-2502.10(c) 8

430 Ill. Comp. Stat. 65/9.5 8

Mass. Gen. Laws ch. 140:

§ 129C 8

§ 129D 8

N.Y. Penal Law:

§ 400.00(11)(c) 8

§ 400.05(6) 8

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INTEREST OF *AMICUS CURIAE*[1]

The Brady Center to Prevent Gun Violence is a non-profit organization dedicated to reducing gun violence through education, research, and legal advocacy. Its membership includes individuals who are concerned with, and are affected by, the public health and safety issues stemming from gun violence. The Brady Center has a substantial interest in ensuring that gun laws are properly interpreted to effectuate the congressional intent to reduce the threat of gun violence. Through its Legal Action Project, the Brady Center has filed numerous briefs *amicus curiae* in cases involving the constitutionality and interpretation of gun laws, including *District of Columbia v. Heller*, 554 U.S. 570 (2008), *United States v. Hayes*, 555 U.S. 415, 427 (2009) (citing Brady Center brief), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and *Abramski v. United States*, 134 S. Ct. 2259 (2014).

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amicus* represent that all parties have consented to the filing of this brief; petitioner filed a letter granting blanket consent to the filing of *amicus* briefs, and written consent from respondent to the filing of this brief is being filed contemporaneously with the brief.

SUMMARY OF ARGUMENT

Petitioner Tony Henderson voluntarily surrendered more than a dozen firearms to the FBI following his arrest for felony distribution of marijuana. After pleading guilty, petitioner sought to transfer those previously surrendered firearms to a person of his choosing. As a convicted felon, however, he could not lawfully "possess any firearm." 18 U.S.C. § 922(g). The court of appeals correctly applied § 922(g) to bar petitioner from designating a recipient to whom the firearms would be transferred. That result follows from the well-settled meaning of the term "possess," which encompasses acts of constructive possession such as controlling the means of transfer, and from Congress's objective of separating firearms from those likely to misuse them. Moreover, that interpretation raises no colorable constitutional concerns.

I. Upon his conviction for felony distribution of marijuana, petitioner was prohibited from "possess[ing] any firearm." 18 U.S.C. § 922(g). It is well settled, and petitioner does not dispute, that, when Congress criminalizes "possession" in criminal statutes such as § 922(g), it criminalizes both actual and constructive possession. *See, e.g., United States v. Walls*, 225 F.3d 858, 864 (7th Cir. 2000) (interpreting 18 U.S.C. § 922(g)). Constructive possession is the "exercise [of] dominion and control over an object, either directly or through others." *Id.* (internal quotation marks omitted).

Petitioner's requested relief ran afoul of § 922(g)'s prohibition on constructive possession. He sought to sell the firearms to a person of his choosing on terms that he set (including price) and to keep the proceeds. These are defining features of constructive posses-

sion: "'set[ting] the price,'" having "'final say as to means of transfer,'" and being "'able to assure delivery.'" *United States v. Wilkes*, 451 F.2d 938, 940-41 (2d Cir. 1971) (Friendly, J.) (quoting *United States v. Jones*, 308 F.2d 26, 31 (2d Cir. 1962) (en banc)); *see United States v. Manzella*, 791 F.2d 1263, 1266-67 (7th Cir. 1986) (Posner, J.) ("[H]e who can *assure* the delivery of a good controls it."). "It strains common sense to say that" petitioner could "orchestrate[] the details of [a] gun sale, negotiating on number of guns and consideration to be paid for them, directing where the guns were to be delivered, [and] collecting the money that had been negotiated and agreed upon as consideration for the guns" and yet "never ha[ve] possession of the guns." *United States v. Nungaray*, 697 F.3d 1114, 1119 (9th Cir. 2012).

The district court therefore properly denied petitioner's request to transfer his firearms to a person of his choosing. Because that was the only relief he requested from that court, it did not err. This Court is not presented with the question of what other means might be available for petitioner to obtain the proceeds of a sale.

II. The understanding that felons may not direct to whom their weapons are transferred is bolstered by Congress's evident intent. In order to reduce gun violence, "Congress sought to rule broadly – to keep guns out of the hands of those who have demonstrated that 'they may not be trusted to possess a firearm without becoming a threat to society.'" *Scarborough v. United States*, 431 U.S. 563, 572 (1977) (quoting 114 Cong. Rec. 14,773 (1968) (statement of amendment sponsor)). It would frustrate that purpose to allow the very people Congress determined should not possess firearms – convicted felons – to direct the

government to transfer their personal firearms to named recipients on terms the felons themselves set. Empirical evidence shows that convicted felons are disproportionately involved in firearms trafficking; that such trafficking schemes are often conducted with the assistance of a straw purchaser who acts as an intermediary at the request or direction of the felon; and that many of those trafficked firearms are subsequently used in crimes.

III. Interpreting § 922(g) in accordance with its plain text and in furtherance of Congress's purpose raises no constitutional concerns. This Court has made clear that the Second Amendment does not bar prohibitions on the possession of firearms by felons. *See District of Columbia v. Heller*, 554 U.S. 570, 626 (2008). Because convicted felons like petitioner have no rights under the Second Amendment, § 922(g)'s prohibition on petitioner's exercise of dominion and control over firearms – including determining who receives those firearms – comports with the requirements of the Constitution. Petitioner's suggestion that the statute may impose burdens prior to conviction is speculative and in any event those harms are at most incidental and *de minimis*. Accordingly, there is no need for this Court to resort to the canon of constitutional avoidance in its interpretation of § 922(g).

ARGUMENT

I. Allowing Felons To Select The Individuals To Receive Their Firearms Is Constructive Possession In Violation Of § 922(g)

Section 922(g) bars convicted felons from "possess[ing] any firearm." 18 U.S.C. § 922(g). "Possession" is a legal term of art with a long history of judicial interpretation. When Congress enacted § 922(g)'s predecessor in 1968,[2] it "presumably kn[ew] and adopt[ed] the cluster of ideas that were attached" to that term "and the meaning its use w[ould] convey to the judicial mind." *Beck v. Prupis*, 529 U.S. 494, 500-01 (2000) (internal quotation marks omitted). By 1968, it was established that "possession" in criminal law included both "actual possession" and "constructive possession," and that "constructive possession" existed where an individual controlled the transfer of property. Section 922(g) therefore prohibited petitioner from transferring his firearms to persons and on terms of his choosing.

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[2] Section 1202(a)(1) of Title VII of the Omnibus Crime Control and Safe Streets Act of 1968 ("OCCSSA") prohibited a convicted felon from "receiv[ing], possess[ing], or transport[ing] in commerce or affecting commerce . . any firearm." Pub. L. No. 90-351, 82 Stat. 197, 236, codified at 18 U.S.C. app. § 1202 (1970) (repealed 1986). Section 102 of the Gun Control Act of 1968 made it unlawful for a convicted felon "to ship or transport any firearm or ammunition in interstate or foreign commerce." Pub. L. No. 90-618, 82 Stat. 1213, 1220, codified as amended at 18 U.S.C. § 922(g). The Firearms Owners' Protection Act of 1986 amended § 922(g) to incorporate the "possession" prohibition from § 1202(a)(1) of OCCSSA. *See* Pub. L. No. 99-308, § 102(6)(D), 100 Stat. 449, 452 (1986) (amending 18 U.S.C. § 922(g) to its present form: making it unlawful for a convicted felon "to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm"). Accordingly, this brief refers to § 1202(a)(1) of OCCSSA as the predecessor of § 922(g) for purposes of the question presented.

A. The term "possession" is "interchangeably used to describe actual possession and constructive possession." *National Safe Deposit Co. v. Stead*, 232 U.S 58, 67 (1914). Accordingly, when Congress has criminalized "possession," it has criminalized both actual and constructive possession. *See GenCorp, Inc. v. Olin Corp.*, 390 F.3d 433, 448 (6th Cir. 2004) (describing, as of 1980, "a statutory and common-law backdrop that had long dignified constructive ownership as a legitimate means by which to establish criminal liability"). For example, by the time § 922(g)'s predecessor was enacted in 1968, courts had uniformly construed criminal "possession" in 21 U.S.C. § 174 (repealed 1970)[3] to encompass constructive possession. *See, e.g., Rodella v. United States*, 286 F.2d 306, 312-13 (9th Cir. 1960); *United States v. Santore*, 290 F.2d 51, 60 (2d Cir. 1959) (en banc). That settled judicial understanding carries forward to other criminal "possession" statutes and through to the present. *See, e.g., United States v. Virciglio*, 441 F.2d 1295, 1298 (5th Cir. 1971) ("possession" of prohibited firearms, such as machineguns, 26 U.S.C. § 5861); *United States v. Ferg*, 504 F.2d 914, 916-17 (5th Cir. 1974) ("possession" with intent to distribute, 21 U.S.C. § 841(a)); *United States v. Steen*, 55 F.3d 1022, 1031 (5th Cir. 1995) (simple "possession," 21 U.S.C. § 844(a)); *United States v. Walls*, 225 F.3d 858, 864 (7th Cir. 2000) (18 U.S.C. § 922(g)).

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[3] The now-repealed § 174 made it unlawful to "receive[], conceal[], buy[], sell[], or in any manner facilitate[] the transportation, concealment, or sale of any [imported] narcotic drug." 21 U.S.C. § 174 (1964). It further provided that a "defendant . . . shown to have or to have had possession of the narcotic drug . . . shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury." *Id.*

Consistent with these precedents, petitioner does not contest that § 922(g) prohibits both actual and constructive possession. *See, e.g.*, Pet. Br. 12.

In turn, constructive possession, as understood in 1968, encompassed the ability to control property, as manifested by the ability to negotiate a price for it, sell it, and direct that the sale be consummated. One definition of "possession" provided by a dictionary contemporaneous with Congress's passage of § 922(g) was "the act or condition of having in or taking into one's control or holding at one's disposal." *Webster's Third New International Dictionary* 1770 (1966). Similarly, courts had defined constructive possession as "dominion and control without physical custody." *E.g.*, *United States v. Hernandez*, 290 F.2d 86, 90 (2d Cir. 1961); *Mack v. United States*, 326 F.2d 481, 484 (8th Cir. 1964) ("a power to exercise dominion and control"); *Brothers v. United States*, 328 F.2d 151, 155 (9th Cir. 1964) ("dominion and control"); *United States v. Dillard*, 376 F.2d 365, 367 (7th Cir. 1967) ("dominion or control over [property], though in the hands of another"). Courts, moreover, had determined that the ability to control the transfer of property by "'set[ting] the price for [the property], ha[ving] the final say as to means of transfer, or [being] able to assure delivery'" constituted constructive possession. *United States v. Wilkes*, 451 F.2d 938, 940-41 (2d Cir. 1971) (Friendly, J.) (quoting *United States v. Jones*, 308 F.2d 26, 31 (2d Cir. 1962) (en banc)).

For example, an individual was held to have "possession" of narcotics where he arranged for a third party to sell heroin to undercover agents, even though there was no evidence he ever had actual possession of the heroin. *See United States v. Malfi*,

264 F.2d 147, 150 (3d Cir. 1959); *see also, e.g.*, *Cellino v. United States*, 276 F.2d 941, 945 (9th Cir. 1960) ("Where a defendant negotiates a sale and receives the purchase price, he has possession through dominion and control, even though delivery is made by another and there is no evidence the seller ever had actual possession."); *Lucero v. United States*, 311 F.2d 457, 459 (10th Cir. 1962) (same where defendant "was the moving party [for a sale]" and "set the price"); *United States v. Ramis*, 315 F.2d 437, 438-39 (2d Cir. 1963) (same where defendant set the price, amount, and location for sale of narcotics); *United States v. Burrell*, 324 F.2d 115, 119 (7th Cir. 1963) (same where defendants "took the orders, made arrangements and even used their own premises for the purpose of transfers").[4]

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[4] The gun possession statutes of several States exhibit this same understanding of "possession." As explained by *amicus* Commonwealth Second Amendment, Inc., several States – Illinois, Massachusetts, New York, and Washington, D.C. – prohibit possessing a firearm without a license under certain circumstances. Commonwealth Br. 5-6. Recognizing that these statutory prohibitions on firearm "possession" operate to limit an individual's ability to transfer his or her firearms if the relevant license expires or is revoked, each State created an explicit exception that allows individuals to transfer or dispose of the firearms using certain procedures. *See id.* at 6-7; 430 Ill. Comp. Stat. 65/9.5 (prohibiting "possession" but providing 48 hours to give "custody" of the firearms to an eligible individual); Mass. Gen. Laws ch. 140, §§ 129C, 129D (prohibiting "possess[ion]" but providing "right, at any time up to one year after said delivery or surrender, to transfer such [guns] to any licensed dealer or any other person legally permitted to purchase or take possession"); N.Y. Penal Law §§ 400.00(11)(c), 400.05(6) (prohibiting "possess[ion]" but providing "right to arrange for the sale, or transfer, of such firearm to a dealer in firearms"); D.C. Code § 7-2502.10(c) (prohibiting "possession" but providing option to "surrender" his guns to the police, "remove [them] from the

Congress gave no indication when it enacted § 922(g)'s predecessor in 1968 – or any of its subsequent incarnations – that it intended to depart from the settled meaning of "possess." *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change"). Courts thus continue to apply that understanding of "possession" under federal criminal law. *See United States v. Manzella*, 791 F.2d 1263, 1266-67 (7th Cir. 1986) (Posner, J.) ("[H]e who can *assure* the delivery of a good controls it."); *United States v. Nungaray*, 697 F.3d 1114, 1119 (9th Cir. 2012) ("possession" where defendant "orchestrated the details of the gun sale" without actual possession). The plain meaning of "possess" in § 922(g) therefore prohibits a felon from controlling the means of transfer of firearms even if he does not have actual possession of the firearms.

Petitioner erroneously contends (at 20-22) that "possess" should be construed narrowly to give it a separate meaning from the term "owner[ship]" in § 924(d)(1) and from "barter[ing]," "sell[ing]," and "dispos[ing] of" in § 922(j). Petitioner's own narrow understanding of "possess," however, creates a similar redundancy: interpreting "possess" to mean only actual, physical possession would give that term little (if any) separate meaning from "receive" and "store," each of which is independently prohibited elsewhere in the statute. *See* 18 U.S.C. § 922(h), (j). Faced with a similar dilemma in *Scarborough v. United States*, 431 U.S. 563 (1977), this Court

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District," or "[o]therwise lawfully dispose of his interest"). In § 922(g), however, Congress chose not to enact an exception that would allow a felon to control the transfer of his or her firearms.

observed that Congress's choice of overlapping terms in § 922(g)'s predecessor makes it impossible "to give real substance" to each word in the statute as a whole, such that each term refers to distinct offenses. *Id.* at 576-77. The best guide to Congress's intent is simply to give "possess" its settled meaning.

B. Petitioner sought to do exactly what a natural reading of § 922(g) prohibits. As the United States explains (at 4-5), he first asked the FBI to transfer the firearms to his mother, JA78-79, and then to a neighbor on terms set by petitioner, JA80-84, 150-51. When petitioner's neighbor decided he no longer wanted the firearms, petitioner asked the FBI to transfer the firearms to a friend or any other "person of [his] choosing," again on terms set by petitioner. JA85-94, 105-15. He presented the FBI with a "bill of sale" stating that the firearms had already been sold to his friend, JA87-89; however, no money had been paid in connection with the sale and no sale price had yet been negotiated, JA162-63. On those facts, both the FBI and the district court had good reason to conclude that petitioner was seeking to exercise control over the firearms and that the transfers he requested would cause him to possess the firearms constructively and violate § 922(g). Thus, the district court properly denied petitioner's request because, as the magistrate judge stated, "allow[ing] the defendant to designate someone else to receive the firearms" is constructive possession prohibited by § 922(g). Pet. App. 12a, 14a. The court of appeals properly affirmed for the same reason. *Id.* at 4a.[5]

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[5] Petitioner argued for the first time on appeal that the court could "order a sale [of the firearms] for [his] account," where petitioner would not "set[] the value, direct[] the sale or purchase of the firearms, but [would] merely [be] compensated for

Those decisions are consistent with the weight of authority in the lower courts. Most of the decisions that petitioner claims support his position did not permit a felon to choose the ultimate recipient of his or her firearms. *See United States v. Zaleski*, 686 F.3d 90, 92, 93-94 (2d Cir. 2012) (approving a sale by a federally licensed gun dealer for the benefit of the movant); *Cooper v. City of Greenwood*, 904 F.2d 302, 306 (5th Cir. 1990) (finding "no reason that a court could not order a sale for the account of a [convicted felon] who, like [petitioner], legally could not possess firearms"); *State v. Fadness*, 268 P.3d 17, 30 (Mont. 2012) (approving the sale of a convicted felon's "firearms, ammunition, and deadly weapons at public sale or auction, or to a licensed firearms dealer, with the proceeds to go to [the felon]");[6] *United States v. Approximately 627 Firearms, More or Less*, 589 F. Supp. 2d 1129, 1139, 1140 (S.D. Iowa 2008) (holding that, while a felon's "designation of his possessory interest in his personal firearms would

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the value of [his] property by a neutral third-party, subject to any commission for such sale." JA193-94. The United States contends (at 22) that the court could not order the government itself to sell the firearms, but expresses the view (at 20-21) that it would be lawful for a federally licensed firearms dealer to sell the firearms on consignment, with the proceeds to go to the felon. Although it is not necessary for this Court to decide the issue in this case, *amicus* agrees with the United States that a consignment sale in which the felon does not determine the recipient of the firearms appears consistent with § 922(g) and does not conflict with the policy underlying that statute.

[6] *Fadness* stated in passing that the state trial court would have had discretion "to release [the felon's] weapons to his parents *for them to sell* on his behalf," but only after making a specific finding that "doing so would not result in [the felon] having 'actual' or 'constructive' possession of the weapons." 268 P.3d at 30 (emphasis added).

result in his constructive possession," the court could "order[] the sale of [the felon's] personal firearms and the distribution of the proceeds to him"); *but see United States v. Miller*, 588 F.3d 418 (7th Cir. 2009); *United States v. Parsons*, 472 F. Supp. 2d 1169 (N.D. Iowa 2007).

Similarly, most of the additional state supreme court decisions cited by *amicus* Commonwealth Second Amendment, Inc. (at 9-12) did not allow a felon to designate the recipient of firearms. *See Serio v. Baltimore County*, 863 A.2d 952, 967-68 (Md. 2004) (felon entitled to "the fair market value" of the firearms, as "realized through a court ordered sale") (citations omitted); *State v. Ludtke*, 446 N.W.2d 797, 800 (Iowa 1989) (directing "the State [to] hold the [felon's] firearms until they can be returned to a person who demonstrates a right to possession or until the property has been deemed abandoned and ownership established in the seizing agency"); *Commonwealth v. Howard*, 713 A.2d 89, 91, 93 (Pa. 1998) (granting felon's petition requesting "that the firearms be delivered to an authorized dealer who would liquidate them and pay him the proceeds"); *but see People v. Minch*, 825 N.W.2d 560, 562 (Mich. 2012) (per curiam).

Indeed, before this Court, petitioner himself is tellingly reticent as to whether he is entitled to direct the firearms to a "person of his choosing," as he requested below. He emphasizes instead the more general argument that "a sale of firearms in the government's possession for the owner's benefit would entail no actual [or constructive] possession." Pet. Br. 11-12, 41-42. Whether an auction of a felon's firearms over which the felon exerts no control amounts to constructive possession is a different question than the one presented, and a question that

the Court need not decide. *See supra* note 5. All the Court need decide is that the courts below did not err by denying petitioner the relief he actually requested from the district court, but now seeks to minimize – the "transfer[]" of firearms "to third parties designated by" petitioner himself. Pet. Br. 14, 42.

Petitioner has good reason to retreat from his previous request that he can be allowed to direct the transfer of his firearms to a specific recipient. As the Ninth Circuit has observed, such an argument is "too clever by half"; it would allow a felon to "orchestrate[] the details of the gun sale, negotiating on number of guns and consideration to be paid for them, directing where the guns were to be delivered, permitting the buyer to look at them, and, when he was satisfied, collecting the money that had been negotiated and agreed upon as consideration for the guns," all without possessing the guns as prohibited by § 922(g). *Nungaray*, 697 F.3d at 1119.[7] The necessary consequence of that argument is that felons could traffic guns without violating § 922(g) as long as they observed proper formalities about never taking actual possession. A similar cramped construction of "possession" in other criminal statutes would allow individuals to traffic the very objects that Congress has prohibited them from possessing.[8]

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[7] *See also, e.g.*, *United States v. Weaver*, 659 F.3d 353, 356 (4th Cir. 2011) (rejecting narrow interpretation of § 922(h)'s prohibition on "any individual . . possess[ing]" firearms while in the course of "employment" of a convicted felon; narrow reading would have allowed a gang leader to direct his accomplices to carry firearms as long as he did not pay them).

[8] Petitioner contends (at 17 n.3) that he will no longer have the right to control the firearms after they are transferred. Even if that contention were correct – which, as the United States notes (at 37-38), the district court was not required to find – it is

II. The Purpose Of § 922(g) Is Best Effectuated By Prohibiting Felons From Choosing Who Receives Their Firearms

In enacting § 922(g)'s predecessor in OCCSSA, "Congress sought to rule broadly – to keep guns out of the hands of those who have demonstrated that 'they may not be trusted to possess a firearm without becoming a threat to society.'" *Scarborough*, 431 U.S. at 572 (quoting 114 Cong. Rec. 14,773 (1968) (statement of amendment sponsor)). That concern is borne out by data. "It is well established that persons with a history of even a single prior arrest are, as a group, substantially more likely than persons with no such history to engage in criminal behavior in the future." Garen J. Wintemute *et al.*, *Prior Misdemeanor Convictions as a Risk Factor for Later Violent and Firearm-Related Criminal Activity Among Authorized Purchasers of Handguns*, 280 J. Am. Med. Ass'n 2083, 2083 (1998), *available at* http://jama.jamanetwork.com/article.aspx?articleid=188297. "[H]andgun purchasers with only 1 prior misdemeanor conviction and no convictions for offenses involving firearms or violence [are] nearly 5 times as likely as those with no prior criminal history to be charged with new offenses involving firearms or violence." *Id.* And an individual who has been to prison is approximately 10 times more likely to be re-arrested not long after his or her release.[9] More-

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irrelevant. The control that petitioner exerts in *directing* the transfer is sufficient to violate § 922(g), regardless of whether he maintains control *after* the transfer.

[9] *See* Thomas P. Bonczar, Bureau of Justice Statistics, *Prevalence of Imprisonment in the U.S. Population, 1974-2001*, at 1 (Aug. 2003) (estimating that 6.6% of Americans born in 2001 will serve prison time during their lifespan), *available at* http://www.bjs.gov/content/pub/pdf/piusp01.pdf; Patricia A.

over, past criminality is correlated not only with future criminality generally, but also with future violent crime.[10]

The danger extends beyond a felon's personal use of a firearm. Data also show that "convicted felons are heavily involved in firearms trafficking." Bureau of Alcohol, Tobacco & Firearms, *Following the Gun: Enforcing Federal Laws Against Firearms Traffickers* 22 (June 2000). A study by the then-Bureau of Alcohol, Tobacco & Firearms ("ATF") of its firearms trafficking investigations found that "[f]elons were involved in 45 percent (690 of 1,530) of the ATF firearms trafficking investigations in various roles" and that, of "2,670 traffickers identified by ATF agents, 25 percent (669) were convicted felons." *Id.* Moreover, more than half of the ATF investigations concerned at least one firearm that had been recovered in a crime. *See id.* at 21. Thus, not only are felons disproportionately involved in firearms

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Langan & David J. Levin, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1994*, at 1 (June 2002) (more than two-thirds of prisoners from a sample of almost 300,000 were re-arrested within three years of release), *available at* http://bjs.gov/content/pub/pdf/rpr94.pdf.

[10] "A review of New York's first 1,000 hits [in its DNA database] showed that the vast majority were linked to crimes like homicide and rape, but of these, 82 percent of the offenders were already in the databank as a result of a prior conviction for a 'lesser' crime such as burglary or drugs." Edwin Zedlewski & Mary B. Murphy, Nat'l Inst. of Justice, *DNA Analysis for "Minor" Crimes: A Major Benefit for Law Enforcement*, No. 253, at 2, 4 (Jan. 2006), *available at* https://www.ncjrs.gov/pdffiles1/jr000253.pdf. A similar study in Florida revealed that "52 percent of database hits against murder and sexual assault cases matched individuals who had prior convictions for burglary." *Id.*

trafficking, but many of the trafficked firearms are also used in crimes.

Illustrative examples are easy to find, many involving the use of straw purchasers who purport to be buying the guns that the felons cannot legally possess:

- In 2000, James Bostic, a convicted felon, trafficked at least 250 handguns to Buffalo, New York, using his girlfriend as a straw purchaser. At least 80 have already been recovered in crimes, including homicides, attempted homicides, and robberies. *See generally* Brady Center to Prevent Gun Violence, *Shady Dealings: Illegal Gun Trafficking From Licensed Gun Dealers* 36 (Jan. 2007), *available at* http://www.bradycampaign.org/sites/default/files/FINAL%20Shady%20Dealings.pdf.
- In 2002, a group of convicted felons operated a gun-trafficking ring that used straw purchasers to buy 17 guns for resale to Chicago gangs. Chicago police recovered many of these guns after they were used in shootings and homicides. *See id.* at 42.
- In 1998, Charles Chapman, a convicted felon, trafficked 28 guns to New York City using two straw purchasers. Police recovered six of these guns after they were used in crimes. One had been used to shoot a police officer. *See id.* at 55.
- In 2012 or 2013, Salvador Martinez, a gang member and convicted felon, trafficked nine semi-automatic rifles to Mexican drug cartels, using an 18-year-old straw purchaser with whom he had been "romantically involved." One rifle was recovered in a shootout. *See* Tom

McGhee, *Judge blasts prison proposal*, Denver Post (Nov. 15, 2013).

- Lowell Ronald Wilson, a convicted felon, trafficked "large quantities of firearms" at gun shows. In 2001, one of those firearms was used to kill a police officer in Texas. Others were recovered in crimes committed in Virginia, Illinois, and Mexico. *See* Americans for Gun Safety Foundation, *Selling Crime: High Crime Gun Stores Fuel Criminals* 18 (Jan. 2004), *available at* http://content.thirdway.org/publications/11/AGS_Report_-_Selling_Crime_-_High_Crime_Gun_Stores_Fuel_Criminals.pdf.
- In 2013, Shawn Johnson, a convicted drug dealer, confessed to police that he had trafficked at least 11 firearms to a New Jersey man who was later charged with attempted murder. Johnson used two straw purchasers, one of whom he "directed to begin buying guns to pay off her drug debt." Mark Bowes, *Richmond gunrunner gets 7 years for straw purchase conspiracy*, Richmond Times-Dispatch (May 7, 2014), *available at* http://www.richmond.com/news/article_8c87e49e-d611-11e3-acbc-0017a43b2370.html (last accessed Jan. 15, 2015)

Petitioner's proposed rule – under which convicted felons could freely determine who should receive their firearms – creates a clear risk of enabling similar trafficking activities. Congress, which has determined (with good reason) that felons are "potentially irresponsible persons," *Barrett v. United States*, 423 U.S. 212, 220-21 (1976), did not intend such perverse results.

Moreover, when compared to the prohibition on actual possession that Congress has undisputedly

already imposed, interpreting § 922(g) to prohibit felons from exercising constructive possession by choosing the recipient of their firearms imposes only a modest additional burden on a felon. Contrary to petitioner's and *amici*'s argument, *e.g.*, Pet. Br. 25-28, Institute for Justice Br. 11-18, this interpretation will not result in a government seizure of the firearms. As the Seventh Circuit has noted, there is no violation of § 922(g) if the government stores the firearms until the felon can seek a pardon or apply for restoration of his rights under 18 U.S.C. § 925(c). *See Miller*, 588 F.3d at 420. Further, although the issue is not presented here, a third-party sale may be permissible, *see Zaleski*, 686 F.3d at 92, 93-94; *supra* note 5, so that the felon can receive the value of the weapon without controlling its transfer. For that reason, there is no basis for suggesting that an affirmance in this case would collapse the distinction between a bar on "possessing" an item and seizing it.

III. This Case Does Not Implicate The Second Amendment Because Felons Do Not Have Second Amendment Rights

There is no reason to depart from the court of appeals' straightforward interpretation of § 922(g) to avoid the purported constitutional infirmities suggested by petitioner and his *amici*. *See* Pet. Br. 33-35; NRA Br. 6-9; Gun Owners of America, Inc. Br. 17-24. There is no colorable Second Amendment issue presented by applying § 922(g) according to its terms and to Congress's purposes. "Like most rights, the right secured by the Second Amendment is not unlimited." *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008). Because the Second Amendment right does not extend to those subject to § 922(g)(1)'s prohibition on the possession of firearms by felons,

the Court need not consider the canon of constitutional avoidance in interpreting the statute.

This Court has made clear that felons lose their Second Amendment rights upon conviction. In *Heller*, the Court explained that "nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill," along with "laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626-27; *see id.* at 627 n.26 (stating that such restrictions are "presumptively lawful regulatory measures"); *see also McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (plurality) ("We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill' We repeat those assurances here.") (quoting *Heller*). Indeed, petitioner and his *amici* concede that "it is presumptively permissible to prohibit those who have been convicted of felonies from possessing guns." Pet. Br. 34 (citing *Heller*, 554 U.S. at 626-27); *see* NRA Br. 7 (acknowledging that there is a "longstanding prohibition on the possession of firearms by felons" and that "*Heller* seemingly recognized the facial validity of th[at] prohibition").

This Court's recognition of the constitutionality of prohibitions on felons' possession of firearms was grounded in widely adopted and long-accepted historical practices at the time of the ratification of the Second Amendment. This Court explained that, "[f]rom Blackstone through the 19th-century cases, commentators and courts routinely explained that the [Second Amendment] right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."

Heller, 554 U.S. at 626. Prohibitions on possession of firearms by felons were prominent among these restrictions. *See* Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204, 266 (1983) ("[f]elons simply did not fall within the benefits of the common law right to possess arms" recognized when the Second Amendment was ratified). This Court has long recognized that constitutional rights may be limited by the historical practices against which they were ratified. *See Richardson v. Ramirez*, 418 U.S. 24, 53 (1974) (relying on contemporaneous practice of States as "convincing evidence of the historical understanding of the Fourteenth Amendment" in upholding constitutionality of felon disenfranchisement); *see also United States v. Stevens*, 559 U.S. 460, 468-69 (2010) (holding that First Amendment does not protect "'well-defined and narrowly limited classes of speech, the prevention and punishment of which have never thought to raise any Constitutional problem'") (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)). Historical practice similarly confirms that felons do not have Second Amendment rights.

Petitioner errs in suggesting (at 33) that the court of appeals' interpretation of § 922(g)(1) "unnecessarily raises Second Amendment concerns by burdening those who fear the government may accuse them of a crime." Petitioner claims (at 34) that § 922(g)(1)'s prohibition on a felon's possession of a firearm "seriously harms a gun owner even before she is formally accused of a crime" because she may choose to sell the firearms rather than forfeit them. This "harm" is illusory. By its terms, § 922(g)(1) does not affect the right of a non-felon to possess a firearm

and so does not apply until a defendant is duly convicted. Any decisions made prior to conviction are not mandated by § 922(g)(1) and thus are not relevant here.

The canon of constitutional avoidance applies only where a proposed interpretation of a statutory text "raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). Because no constitutional doubts – much less serious ones – arise from a regulation of a felon's possession of a firearm, there is no warrant for this Court to depart from the more plausible interpretation of the statutory text adopted by the courts of appeals. *See Verizon Communications Inc. v. FCC*, 535 U.S. 467, 523 (2002) (declining to apply canon where statutory interpretation does not raise "serious constitutional question").

CONCLUSION

The judgment of the Eleventh Circuit should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

TONY HENDERSON,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* COMMONWEALTH SECOND AMENDMENT, INC.; NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC.; ILLINOIS STATE RIFLE ASSOCIATION; AND ILLINOIS CARRY IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTERESTS OF THE *AMICI* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. The Laws of the Jurisdictions that Prohibit the Unlicensed "Possession" of Firearms Universally Recognize a Disqualified Owner's Non-Possessory Interests 4

A. States that Presumptively Prohibit Possession 5

B. NFA Firearms 7

II. Most State Supreme Courts Reject the Lower Court's Expansive Interpretation of Possession 8

III. The Lower Court's Approach Would Have Severe and Untenable Ramifications for People Living in the Jurisdictions of the *Amici* 13

CONCLUSION 18

TABLE OF AUTHORITIES

CASES

Banks v. Detroit Police Dept.,
454 N.W.2d 198 (Mich. Ct. App. 1990) 10

Butner v. United States,
440 U.S. 48 (1979) 9

Cooper v. Greenwood,
904 F.2d 302 (5th Cir. 1990) 4

Dorman v. State,
34 Ala. 216 (1859) 12

Eaton v. B.C. & M.R.R.,
51 N.H. 504 (1872) 12

Gibbs v. Tally,
65 P. 970 (Cal. 1901) 12

Iowa v. Ludtke,
446 N.W.2d 797 (Iowa 1989) 10, 11

Kelso v. Kelso,
15 N.E.3d 767 (Mass. App. Ct. 2014) 16

Lindsay v. Alabama,
958 So. 2d 346 (Ala. Civ. App. 2006) 13

Maine v. Pouliot,
832 A.2d 755 (Me. 2003) 11

McCullough v. Brown,
19 S.E. 458 (S.C. 1894) 12

McKinster v. Sager,
72 N.E. 854 (Ind. 1904) 12

Michigan v. Minch,
825 N.W.2d 560 (Mich. 2012) 10

Montana v. Fadness,
268 P.3d 17 (Mont. 2012) 9

Pennsylvania v. Howard,
713 A.2d 89 (Pa. 1998) 11

Ruckelshaus v. Monsanto Co.,
467 U.S. 986 (1984) 98

Salt Lake City Water & Elec. Power Co. v. Salt Lake City,
67 P. 791 (Utah 1902) 12

Serio v. Baltimore Co.,
863 A.2d 952 (Md. 2004) 9

Smith v. Goguen,
415 U.S. 566 (1974) 17

St. Louis v. Hill,
22 S.W. 861 (Mo. 1893) 12

State ex rel. George v. City Council of Aiken,
20 S.E. 221 (S.C. 1894) ... 12

State v. Ruggiero,
35 A.3d 616 (N.H. 2011) 16

Staton v. Norfolk & C. R.,
16 S.E. 181 (N.C. 1892) 12

Taylor v. Wyoming,
7 P.3d 15 (Wyo. 2000) 12, 13

Tod v. Wick Bros. & Co.,
36 Ohio St. 370 (1881) 12

United States v. Bagley,
899 F.2d 707 (8th Cir. 1990) 14, 17

United States v. Felici,
208 F.3d 667 (8th Cir. 2000) 13, 14

United States v. Headley,
50 Fed. Appx. 266 (6th Cir. 2002) 14

United States v. Howell,
425 F.3d 971 (11th Cir. 2005) 13, 14

United States v. Smith,
142 Fed. Appx. 100 (3d Cir. 2005) 14

Wilcox v. Penn Mut. Life Ins. Co.,
55 A.2d 521 (Pa. 1947) 12

Williams v. United States,
341 U.S. 97 (1951) 17

Wynehamer v. People,
13 N.Y. 378 (1856) 12

STATUTES AND REGULATIONS

18 U.S.C. § 922 10

18 U.S.C. § 922(d)(8) 16

18 U.S.C. § 922(g) 9, 10

18 U.S.C. § 922(g)(1) 9, 13

26 U.S.C. § 5845(a) 7

26 U.S.C. § 5861(d) 7

27 C.F.R. § 72.39(a)(2) 8

D.C. Code § 7-2502.01(a) 5

D.C. Code § 7-2502.10(a)	15
D.C. Code § 7-2502.10(c)	6
D.C. Code § 7-2503.01(b)	7
D.C. Code § 7-2507.6(a)	5
430 Ill. Comp. Stat. 65/2(a)(1)	5
430 Ill. Comp. Stat. 65/8.2	16
430 Ill. Comp. Stat. 65/9	15
430 Ill. Comp. Stat. 65/9.5(a)(2)	6
430 Ill. Comp. Stat. 65/12	76
430 Ill. Comp. Stat. 65/14(e)	5
La. Civil Code Ann. art. 477(A)	12
Mass. Gen. Laws ch. 140, § 129B(1)(viii)	16
Mass. Gen. Laws ch. 140, § 129B(4)	15, 16
Mass. Gen. Laws ch. 140, § 129B(5)	15
Mass. Gen. Laws ch. 140, § 129C	5
Mass. Gen. Laws ch. 140, § 129C(n)	7
Mass. Gen. Law ch. 140, § 129D	6
Mass. Gen. Laws ch. 140, § 131(d)(vi)	16
Mass. Gen. Laws ch. 140, § 131(f)	15, 16
Mass. Gen. Laws ch. 269, § 10(a)(1)	5
Mass. Gen. Laws ch. 269, § 10(h)(1)	5
N.Y. Crim. Proc. Law § 530.14(1)	16

N.Y. Penal Law § 265.00(3) 5

N.Y. Penal Law § 265.01-b 5

N.Y. Penal Law § 265.02(7) 5

N.Y. Penal Law § 265.20(a)(1)(f) 76

N.Y. Penal Law § 265.20(a)(3) 5

N.Y. Penal Law § 265.00(22) 5

N.Y. Penal Law § 400.00(11) 15

N.Y. Penal Law § 400.00(11)(c) 6

N.Y. Penal Law § 400.05(6) 6

OTHER AUTHORITIES

ATF, *Transfers of National Firearms Act Firearms in Decedents' Estates* (Sept. 5, 1999), *available at* https://www.atf.gov/press/releases/1999/09/090599-openletter-nfa-estate-transfers.html (last visited Dec. 25, 2014) 8

1 William Blackstone, *Commentaries* 12

http://jamesdjulia.com/auction/369-october-2014-firearms-auction/?prices=1 (last visited Dec. 15, 2014) 7

Memorandum from Bobby S. Tyler, Regional Counsel, ATF, to Denver, Colo. Resident Agent (Feb. 6, 1987), *available at* http://www.titleii.com/bardwell/atf_letter28.txt (last visited Dec. 15, 2014) 8

Restatement (3d) of Property (Wills and Other Donative Transfers) (2011)
§ 24.1 12

§ 24.2 12

Restatement of Property (1936)
§ 5 12

INTERESTS OF THE *AMICI*[1]

The *Amici* are all organizations that represent the interests of lawful gun owners in their respective states of Massachusetts, New York, and Illinois – states that prohibit the unlicensed "possession" of firearms. The issue before the Court has particular significance for individuals living in these jurisdictions, and the Court's resolution of this case could have far-reaching impacts on the organizations' membership.

Amicus Commonwealth Second Amendment, Inc. ("Comm2A") is a Massachusetts nonprofit corporation dedicated to preserving and expanding the Second Amendment rights of individuals residing in Massachusetts and New England. Comm2A works locally and with national organizations to promote a better understanding of the rights that the Second Amendment guarantees. Comm2A has previously submitted *amicus curiae* briefs to this Court and to state supreme courts, and it has also sponsored litigation to vindicate the rights of lawful Massachusetts gun owners. Comm2A receives and responds to many queries from the public regarding firearms laws and licensing in Massachusetts, and particularly, regarding the ramifications of losing a Massachusetts firearms license.

Amicus New York State Rifle & Pistol Association, Inc. ("NYSRPA") is a non-profit member organization

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[1] No counsel for any party authored this brief in whole or in part, nor did any counsel or party make any monetary contribution intended to fund the preparation or submission of this brief. All parties' counsel of record received timely notice of the intended filing of this brief, and all consented to its filing.

first organized in 1871 in New York City. NYSRPA is the oldest firearms advocacy organization in the United States, and it is the largest firearms organization in the state of New York. NYSRPA provides education and training in the safe and proper use of firearms, promotes the shooting sports, and supports the right to keep and bear arms through both legislative and legal action.

One of the nation's largest state gun rights organization, *amicus* Illinois State Rifle Association ("ISRA") is a non-profit 30,000-plus member association. Organized in 1913, ISRA seeks to support and protect the Second Amendment right to keep and bear arms of all citizens, particularly those living in Illinois. With its five lobbyists in the State capital, and a strong attorney referral program, ISRA works to protect the rights and interests of law-abiding citizens who use guns to protect their families, to hunt, and for sporting purposes such as target shooting. ISRA provides instruction in the safe use of firearms, and it works to promote and improve marksmanship skills. ISRA also endeavors to ensure that shooting ranges are safe, preserved, and available, including its newly improved outdoor range in Kankakee, Illinois.

Finally, *amicus* Illinois Carry is an all-volunteer member organization incorporated in Illinois. Illinois Carry is dedicated to preserving the right to keep and bear arms that the Second Amendment secures, and its core purposes include educating the public about Illinois laws governing the purchase, transportation, carry and use of firearms, and otherwise aiding the public in every way within its power in matters relating to these activities. Illinois Carry supports the

right to keep and bear arms through both legislative and legal action.

SUMMARY OF ARGUMENT

The issue before the Court has significant ramifications for people living in the U.S. jurisdictions that prohibit the unlicensed "possession" of firearms: Illinois, Massachusetts, New York, and Washington, D.C. It also has significant ramifications for people who lawfully own firearms subject to the National Firearms Act ("NFA"), as these guns are also illegal to "possess" in the absence of a valid registration in the individual's name. An expansive concept of "possession" would have untenable ramifications for the lawful gun owners who are subject to these regimes.

This *amici curiae* brief shows that the laws in these four jurisdictions universally recognize that an individual's ownership interest in firearms survives the individual's loss of the right to possess the firearms, and that a person prohibited from possession still has the right to transfer the property to another party or to sell it. Moreover, guidance provided by the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") for NFA firearms likewise recognizes that ownership is distinct from possession, and that a person who can no longer possess a validly registered NFA firearm still has the right to lawfully sell or transfer the property.

At least seven state supreme courts have addressed how to deal with the firearms of individuals who have become prohibited – and the clear majority rule is that such individuals still retain ownership in their firearms and the ability to transfer or dispose of them in some manner. Indeed, the only state high court that

has held to the contrary did so by relying on Eighth Circuit authority, and without acknowledging the competing rulings of other Circuit Courts of Appeals.

Aside from being wrong and patently inconsistent with pertinent state laws, the lower court's expansive concept of constructive possession would result in untenable consequences in the U.S. jurisdictions that have adopted licensing schemes. Most notably, the loss of a firearms license would become tantamount to forfeiture of a gun collection – regardless of the basis for the loss. Moreover, the children, parents, spouses, roommates, and heirs of lawful gun owners would be in constant jeopardy of criminal liability. For people living in the jurisdictions of the *amici*, reducing the entire bundle of property rights to the mere right of possession would severely increase the risk of erroneous or unjust property deprivations, as well as creating substantial uncertainty about what is and is not lawful.

ARGUMENT

I. The Laws of the Jurisdictions that Prohibit the Unlicensed "Possession" of Firearms Universally Recognize a Disqualified Owner's Non-Possessory Interests

While it is true in most of the United States that "firearms are not contraband per se," *Cooper v. Greenwood*, 904 F.2d 302, 304 (5th Cir. 1990), the proposition does not hold absolutely. First, three U.S. states and the District of Columbia all make it a crime to "possess" a gun, unless one has a license or registration. And second, federal law makes it a crime to "possess" certain types of guns unless they are

registered under the National Firearms Act ("NFA"). What is significant is that each of these jurisdictions have provisions – whether by statute, regulation, or policy – that recognize an individual's ongoing property interests in the arms subject to licensing or registration when the individual becomes incapable of legally possessing them.

A. States that Presumptively Prohibit Possession

In Illinois, Massachusetts, New York, and Washington, DC, it is a crime to possess a gun without a mandatory license or registration – meaning that guns are, by default, unlawful. *See* D.C. Code § 7-2502.01(a); 430 Ill. Comp. Stat. 65/2(a)(1); Mass. Gen. Laws ch. 140, § 129C; N.Y. Penal Law §§ 265.01-b, 265.20(a)(3).[2] The basic crime of unlawfully possessing a gun is either a misdemeanor or a felony, depending variously on the jurisdiction, the situs of possession, and the type of firearm. *See* D.C. Code § 7-2507.6(a) (misdemeanor); 430 Ill. Comp. Stat. 65/14(e) (misdemeanor); Mass. Gen. Laws ch. 269, §§ 10(a)(1), 10(h)(1) (felony to possess a handgun away from the home and otherwise a misdemeanor); N.Y. Penal Law § 265.01-b (felony to possess a handgun). In these places, the loss of a license – for whatever reason, whether a revocation for cause or an unwitting failure

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[2] New York prohibits the possession of unlicensed and/or unregistered handguns and "assault weapons," but it does not license or register other rifles and shotguns. *See* N.Y. Penal Law §§ 265.00(3), (22) (defining "firearm" as, *inter alia*, "any pistol or revolver," and "assault weapon" to exclude a gun registered with state police); 265.01-b, 265.02(7), 265.20(a)(3).

to renew on time – equates to the loss of one's ability to lawfully "possess" firearms.

Yet, the statutory laws in *all* of these jurisdictions recognize that a gun owner's property interests extend beyond possession – and that a person who loses a license still retains title to his or her property. For example, when authorities revoke a gun license in Illinois, state law grants the licensee 48 hours to place his or her guns in the "custody" of another person who is eligible to possess them. *See* 430 Ill. Comp. Stat. 65/9.5(a)(2). In Massachusetts, a person who loses his or her license must "without delay deliver or surrender" his or her guns to a law enforcement agency, but state law expressly qualifies that the person "shall have the right, at any time up to one year after said delivery or surrender, to transfer such [guns] to any licensed dealer or any other person legally permitted to purchase or take possession. " Mass. Gen. Law ch. 140, § 129D. New York requires a person to "surrender[ ]" guns to law enforcement in the event of a suspension or denial, but the statute similarly protects the owner's "right to arrange for the sale, or transfer, of such firearm to a dealer in firearms . or for the transfer of such firearm to himself or herself" if he or she becomes licensed again. *See* N.Y. Penal Law §§ 400.00(11)(c), 400.05(6). And finally, in the event of a denial or revocation in the District of Columbia, the law provides seven days in which a person can choose to "surrender" his or her guns to the police, "remove [them] from the District," or "[o]therwise lawfully dispose of his interest." D.C. Code § 7-2502.10(c). Moreover, each of these jurisdictions also provides statutory exceptions that allow unlicensed executors to take custody of guns after their licensed owners pass

away. *See id.* § 7-2503.01(b); 430 Ill. Comp. Stat. 65/12; Mass. Gen. Laws ch. 140, § 129C(n); N.Y. Penal Law § 265.20(a)(1)(f).

Thus, in all four of the U.S. jurisdictions that license the possession of firearms, the law is clear that the loss of a license does *not* result in the loss of title to firearms, even though it becomes a crime to "possess" them.

B. NFA Firearms

The National Firearms Act makes it illegal for anyone to "receive or possess" certain types of firearms – such as machineguns, silencers, and "sawed off" shotguns – unless (among other things) the person has registered them with the Bureau of Alcohol, Tobacco, Firearms, and Explosives. 26 U.S.C. § 5861(d); *see also id.* § 5845(a) ("firearm" definition). Thus, when the owner of a registered NFA firearm dies, there is no one left with an exemption from the federal law that makes it a felony to "receive or possess" the NFA firearm. This creates the potential for the loss of significant value from estates, as NFA firearms can be very valuable. For example, individual NFA-registered machineguns sold for between $3,680 and $100,625 in the October 2014 James D. Julia auction in Fairfield, Maine. *See* http://jamesdjulia.com/auction/369-october-2014-firearms-auction/?prices=1 (last visited Dec. 15, 2014).

But again, directives from ATF reflect the understanding that a person's interest in NFA firearms extends beyond the single attribute of possession to also include the right to sell or bequest the property. First, ATF has for many years advised the families of

NFA firearm owners that while the "[p]ossession of an NFA firearm not registered to the possessor is a violation of Federal law we do allow the executor a reasonable time to arrange for the transfer of the registered firearms. " ATF, *Transfers of National Firearms Act Firearms in Decedents' Estates* (Sept. 5, 1999), *available at* https://www.atf.gov/press/releases/1999/09/090599-openletter-nfa-estate-transfers.html (last visited Dec. 15, 2014). Additionally, on at least one occasion ATF has authorized the attorney of a person recently convicted of a felony to take custody of the person's registered NFA firearms, pursuant to an order of the convicting court, and to sell them for the person's benefit. *See* Memorandum from Bobby S. Tyler, Regional Counsel, ATF, to Denver, Colo. Resident Agent (Feb. 6, 1987), *available at* http://www.titleii.com/bardwell/atf_letter28.txt (last visited Dec. 15, 2014). This guidance plainly reflects the latent understanding that the loss of the legal ability to possess an article does not end other property rights in the article. Not insignificantly, ATF's own regulations governing the return of seized property provide that one option available to ATF is to "order the property . sold for the account of the petitioner." 27 C.F.R. § 72.39(a)(2).

II. Most State Supreme Courts Reject the Lower Court's Expansive Interpretation of Possession

The predicate to determining what interests an individual loses when he or she becomes ineligible to "possess" a firearm is identifying the interests that the individual holds to start out with. Federal law is not the source of these property interests, but "[r]ather,

they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984) (internal quotations and alteration omitted); *see also, e.g.*, *Butner v. United States*, 440 U.S. 48, 57 (1979) ("Property interests are created and defined by state law.").

At least seven state supreme courts have addressed the scope of possession in the context of firearms and prohibited persons, and the clear majority rule is that a lawful gun owner who loses his or her right to possess firearms still retains an ownership interest in them and can transfer them to a third party. First is the Supreme Court of Montana's ruling in *Montana v. Fadness*, 268 P.3d 17 (Mont. 2012), that, notwithstanding 18 U.S.C. § 922(g)(1), it is acceptable "to release [a prohibited individual's] weapons to [a third party] for them to sell on his behalf" so long as it does not result in the prohibited person's actual or constructive possession of the guns. *See id.* at 30. The Montana high court discussed the circuit split and rejected the claim that a third party's possession of the individual's guns would necessarily involve constructive possession. *See id.* at 22, 29-30.

The Court of Appeals of Maryland has likewise ruled that, even though an individual is "not permitted to possess" firearms on account of a felony conviction, the person still "retains an ownership property interest in them." *Serio v. Baltimore Co.*, 863 A.2d 952, 966 (Md. 2004). The immediate issue there was a state law that made it illegal for felons to "possess" certain firearms, but the court referenced § 922(g) and relied substantially on authorities that addressed the exact

same issue under the federal statute. *See id.* at 964-65. The Maryland high court counseled a court-ordered auction of the firearms with the proceeds paid to the prohibited owner. *See id.* at 967-68.

The Supreme Court of Michigan has also held that even though a state felon-in-possession law "suspends a felon's possessory interest in his or her firearms , nothing in the statute severs a felon's ownership interest in his or her firearms." *Michigan v. Minch*, 825 N.W.2d 560, 562 (Mich. 2012). "Thus, it would be lawful for another third party, including defendant's mother, to assume possession of these firearms as bailee." *Id.* at 563. The *Minch* court relied significantly on authorities construing § 922(g) and found that its resolution was "consistent with many federal cases addressing the issue." *See id.* at 562 n.9. Notably, a mid-level Michigan appellate court had previously concluded that while § 922 prevented "turn[ing] over the firearms to plaintiff directly," the plaintiff could still "designate an individual to receive the guns or produce the owners of the guns to reclaim them." *See Banks v. Detroit Police Dept.*, 454 N.W.2d 198, 200 (Mich. Ct. App. 1990), *overruled in part by Minch*, 825 N.W.2d 560. In *Minch*, the Michigan high court overruled this decision to the extent it allowed an agent, rather than a bailee, to take possession – but critically, it recognized that ownership interests are distinct from, and survive the loss of, possessory interests. *See Minch*, 825 N.W.2d at 562-63 & n.9.

The high courts of Iowa and Maine have also both rejected the lower court's expansive interpretation of possession in the context of firearms and felon-in-possession prohibitions. In *Iowa v. Ludtke*, 446 N.W.2d

797 (Iowa 1989), the Supreme Court of Iowa concluded that even though an individual could not "possess" firearms under state law on account of his felony conviction, "the State has not acquired ownership of the firearms through either the abandonment of seized property or by a forfeiture proceeding." *Id.* at 800. The court found the state did not own the guns, but instead needed to retain them "until they can be returned to a person who demonstrates a right to possession or until the property has been deemed abandoned and ownership established in the seizing agency." *Id.* And in *Maine v. Pouliot*, 832 A.2d 755 (Me. 2003), the Supreme Judicial Court of Maine upheld a trial court's conclusion that a convicted felon had *not* constructively possessed firearms – even though he had a key for the locked room in which his parents kept them. *See id.* at 757.

Finally, in *Pennsylvania v. Howard*, 713 A.2d 89 (Pa. 1998), the Supreme Court of Pennsylvania ruled that even though the terms of an individual's criminal sentence prevented the "possession" of firearms, this did not prevent delivering the firearms "to an authorized dealer who would liquidate them and pay him the proceeds." *Id.* at 91; *see also id.* at 93 (granting petition). The court observed that guns not involved in the criminal conduct that led to a criminal conviction "do not become contraband merely because their owner engaged in criminal conduct." *Id.* at 93.

These decisions are entirely consistent with the elemental and longstanding rule that the essential attributes of personal property include not just possession, but also the rights of use, enjoyment, and disposition – as Petitioner has demonstrated, and as

the above discussion of pertinent state laws shows. *See* Restatement (3d) of Property (Wills and Other Donative Transfers) § 24.1 & cmts. d-e (2011); Restatement of Property § 5 & cmt. e (1936); *see also Wynehamer v. People*, 13 N.Y. 378, 396 (1856) (property is "[t]he third absolute right of every Englishman which consists in the free use, enjoyment and *disposal* of all his acquisitions. " (quoting 1 William Blackstone, *Commentaries* *138)); *accord Wilcox v. Penn Mut. Life Ins. Co.*, 55 A.2d 521, 528 (Pa. 1947); *McKinster v. Sager*, 72 N.E. 854, 857 (Ind. 1904); *Salt Lake City Water & Elec. Power Co. v. Salt Lake City*, 67 P 791, 795 (Utah 1902); *Gibbs v. Tally*, 65 P 970, 971-72 (Cal. 1901); *McCullough v. Brown*, 19 S.E. 458, 469 (S.C. 1894), *overruled on other grounds by State ex rel. George v. City Council of Aiken*, 20 S.E. 221 (S.C. 1894); *St. Louis v. Hill*, 22 S.W. 861, 862 (Mo. 1893); *Staton v. Norfolk & C. R.*, 16 S.E. 181, 184 (N.C. 1892); *Tod v. Wick Bros. & Co.*, 36 Ohio St. 370, 385 (1881); *Eaton v. B.C. & M.R.R.*, 51 N.H. 504, 511 (1872); *see also Dorman v. State*, 34 Ala. 216, 239 (1859). Indeed, this basic understanding of the nature of property is also present in civil law systems. *See* La. Civil Code Ann. art. 477(A); *see also* Restatement (3d) of Property (Wills and Other Donative Transfers) § 24.2 reporters' note 4 (2011).

In contrast, counsel's research has disclosed only *one* state high court that has adopted the lower court's expansive interpretation – and it is not even clear that this court did so. In *Taylor v. Wyoming*, 7 P.3d 15 (Wyo. 2000), the Supreme Court of Wyoming ruled that "the district court did not err in ordering [firearms] to remain in the possession of law enforcement" because the defendant could no longer possess them pursuant

to 18 U.S.C. § 922(g)(1). *Id.* at 24. However, the court never addressed whether the person could transfer the guns to another party. *See id.* The Wyoming high court cited Eighth Circuit authority, but made no reference to the split between the circuits on this point. *See id.* This same theme of cursory analysis, coupled with a quick citation to Eighth or Eleventh Circuit authority, appears in a decision from a mid-level Alabama appellate court. In *Lindsay v. Alabama*, 958 So. 2d 346 (Ala. Civ. App. 2006), the court reasoned that, pursuant to *United States v. Felici*, 208 F.3d 667 (8th Cir. 2000), and *United States v. Howell*, 425 F.3d 971 (11th Cir. 2005), a person convicted of a felony "would not be entitled to have any firearms seized from his residence held in trust for him by a third party, *i.e.*, his brother, because such a request would permit a convicted felon's constructive possession of a firearm." *Lindsay*, 958 So. 2d at 348 n.1. The court did not address the fact that other Circuit Courts of Appeals have reached the opposite conclusion. *See id.*

III. The Lower Court's Approach Would Have Severe and Untenable Ramifications for People Living in the Jurisdictions of the *Amici*

The lower court's construction of "possession" would be more than just incongruent with the regulatory regimes that apply in the places where firearms are presumptively illegal to possess: this construction, if adopted, would have absurd and untenable consequences for individuals living in these jurisdictions. And it should be clear that this Court's exposition on the scope of bans on firearms "possession" will significantly influence the manner in which state

courts address this issue in substantially analogous contexts in the future.

The lower court's view is that "return of seized firearms, either directly or indirectly" would violate the federal law prohibiting possession, and that this includes "plac[ing] the firearms in the possession of a relative in trust or [to] sell the firearms and distribute the proceeds to him." *Howell*, 425 F.3d at 976-77. The Eighth Circuit, which supplied the authority on which the lower court ultimately relied, *see id.*, reasons similarly that "hav[ing] the firearms held in trust by a third party suggests constructive possession," and that "[*a*]*ny* firearm possession, actual or constructive, by a convicted felon is prohibited by law," *Felici*, 208 F.3d at 670 (emphasis added); *see also United States v. Smith*, 142 Fed. Appx. 100, 102 (3d Cir. 2005); *United States v. Headley*, 50 Fed. Appx. 266, 267-68 (6th Cir. 2002). By the Eighth Circuit's view, "to allow [an individual] to reap the economic benefit from ownership of weapons which it is illegal for him to possess would make a mockery of the law." *United States v. Bagley*, 899 F.2d 707, 708 (8th Cir. 1990) (quoting district court opinion).

Amici agree with Petitioner's able demonstration that this expansive construction of possession is wrong because it violates the fundamental and longstanding principle that possession is but one "stick" in the bundle of property rights. But setting this aside, it is important to note that this expansive concept of possession would have untenable results that would render it unworkable in application – particularly in the states in which the *Amici* reside.

Perhaps the most apparent untenable result is that the loss of a firearm license – for any reason, including not just suspension or revocation, but also an unintentional failure to renew the license or to update one's address – would equate to the complete loss of a person's property interests in his or her firearms. After all, each of these jurisdictions makes it illegal to "possess" a gun without a license, and if a legal prohibition on possession prohibits *any* arrangement that involves third parties holding the guns or that otherwise allows the owner to recover their economic value, then the result is that the loss of a license prevents a person not only from possessing guns – but also from transferring them to third parties, or otherwise receiving their economic benefit. Thus, the only option would be to relinquish possession of the guns to authorities, which would immediately result in the loss of all right, title, and interest to them.

This situation would be particularly unjust when one considers the fact that (at least in certain circumstances) authorities can suspend or revoke firearms licenses on an *ex parte* basis, without providing any prior notice to the owner. *See, e.g.*, 430 Ill. Comp. Stat. 65/9; Mass. Gen. Laws ch. 140, §§ 129B(4)-(5), 131(f); N.Y. Penal Law § 400.00(11). *But see* D.C. Code § 7-2502.10(a) (requiring 15 days' prior notice). Thus, as a practical matter, anyone who desired could strip a lawful firearms owner of his or her entire gun collection merely by making false assertions about the individual's competency to possess firearms. Or, a person with a grudge could instead seek a temporary (*ex parte*) order of protection on falsified

grounds.[3] While federal law imposes a ban on possession only after the individual has been afforded a hearing, *see* 18 U.S.C. § 922(d)(8), the laws in Illinois and Massachusetts suspend a gun license immediately upon the issuance of any order of protection, including an *ex parte* one, and New York law also allows (but does not require) immediate suspension on the issuance of an *ex parte* order, *see* 430 Ill. Comp. Stat. 65/8.2; Mass. Gen. Laws ch. 140, §§ 129B(1)(viii) & (4), 131(d)(vi) & (f); N.Y. Crim. Proc. Law § 530.14(1).

Another untenable result is the impact that an overly expansive definition of constructive possession would have on unlicensed individuals living in the same household as licensed individuals. If *any* ability to direct the actions of a third party relative to a firearm, or to receive the proceeds derived from the sale of a firearm, constituted constructive possession, then any unlicensed child, spouse, or roommate would face the constant threat of criminal prosecution. For example, even though a child, spouse, or roommate might be unlicensed, they might still have the ability to direct or request the licensed individual to move the guns or to store them in a different manner – which, according to the Eighth and Eleventh Circuits, is constructive possession. Or, suppose a married couple decided to invest some of their savings in a collection of firearms with the understanding that they would sell the firearms in the future and jointly share the proceeds – under the Eighth Circuit's rationale in

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[3] This possibility is far from hypothetical, as demonstrated in *State v. Ruggiero*, 35 A.3d 616 (N.H. 2011) and *Kelso v. Kelso*, 15 N.E.3d 767 (Mass. App. Ct. 2014), where separated spouses obtained orders of protection by submitting falsified evidence to authorities.

Bagley, the mere fact that both spouses had an interest in the proceeds would make them both constructive possessors in need of a license. And closely related to this is the issue of future interests. If a parent's will directed the sale of a gun collection for the benefit of a child, then again, the child's interest in the financial proceeds of the guns would make that child a constructive possessor in need of a license – meaning that the bequest would be forfeited if the child did not have a license.

It would certainly be possible for lower courts to develop new and creative exceptions that would avoid or at least ameliorate these results – but the more pertinent observation is that these absurd results occur only if courts eschew the traditional understanding of constructive possession for the expansive one applied below. *Cf. Smith v. Goguen*, 415 U.S. 566, 577-78 (1974) ("To be sure, there are statutes that by their terms or as authoritatively construed apply without question to certain activities, but whose application to other behavior is uncertain."); *Williams v. United States*, 341 U.S. 97, 101 (1951) ("Many criminal statutes might be extended to circumstances so extreme as to make their application unconstitutional."). The traditional and customary definition of constructive possession that the Second, Seventh, and Fifth Circuits recognize – along with a strong majority of state supreme courts – avoids these absurdities and provides the only means of resolving this issue in a manner that is consistent and harmonious with other laws governing the possession of firearms.

CONCLUSION

The lower court's judgment disregards the foundational concept that possession is but one stick in the bundle of property rights and, if adopted, this constructive possession rationale would lead to absurd and untenable results. This Court should reverse.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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In The
Supreme Court of the United States

TONY HENDERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF *AMICI CURIAE* CRPA FOUNDATION, GUN OWNERS OF CALIFORNIA, CALGUNS SHOOTING SPORTS ASSOCIATION, AND KANSAS STATE RIFLE ASSOCIATION IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. ALLOWING MR. HENDERSON TO SELL OR TRANSFER HIS LAWFULLY OWNED, NON-CONTRABAND FIREARMS TO AN APPROPRIATE THIRD PARTY WOULD NOT GIVE HIM CONSTRUCTIVE POSSESSION OF A FIREARM IN VIOLATION OF 18 U.S.C. § 922(g) 4

II. BARRING A PROHIBITED PERSON FROM TRANSFERRING OR SELLING HIS LAWFULLY OWNED FIREARMS CONTRAVENES SECTION 922(g)'s LEGISLATIVE INTENT AND OTHER IMPORTANT POLICY CONSIDERATIONS 12

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

Barrett v. United States, 423 U.S. 212 (1976) 13

District of Columbia v. Heller, 554 U.S. 570 (2008) 2, 3

Huddleston v. United States, 415 U.S. 814 (1974) 12, 13

McDonald v. City of Chicago, 561 U.S. 742 (2010) 1, 3

Scarborough v. United States, 431 U.S. 563 (1977) 12

United States v. Bonham, 477 F.2d 1137 (3d Cir. 1973) 6

United States v. Brown, 754 F. Supp. 2d 311 (D. N.H. 2010) 11

United States v. Caldwell, 423 F.3d 754 (7th Cir. 2005) 6

United States v. Griffin, 684 F.3d 691 (7th Cir. 2012) 7

United States v. Grubbs, 506 F.3d 434 (6th Cir. 2007) 7, 8

United States v. Gunn, 369 F.3d 1229 (11th Cir. 2004) 8

United States v. Henderson, 555 Fed. App'x 851 (11th Cir. 2014) 4

United States v. Howell, 425 F.3d 971 (11th Cir. 2005) 4, 5

TABLE OF AUTHORITIES – Continued

Page

United States v. Jenkins, 90 F.3d 814 (3d Cir. 1996) 5

United States v. Kelso, 942 F.2d 680 (9th Cir. 1991) 8

United States v. Lawing, 703 F.3d 229 (4th Cir. 2012) 6

United States v. Mason, 233 F.3d 619 (D.C. Cir. 2000) 13

United States v. Miller, 588 F.3d 418 (7th Cir. 2009) 6, 10, 11, 14, 15

United States v. Mills, 29 F.3d 545 (10th Cir. 1994) 8

United States v. Payton, 159 F.3d 49 (2d Cir. 1998) 6

United States v. Perez, 661 F.3d 568 (11th Cir. 2011) 5

United States v. Thomas, 321 F.3d 627 (7th Cir. 2003) 8

United States v. Zaleski, 686 F.3d 90 (2d Cir. 2012) 11

United States v. Zeigler, 994 F.2d 845 (D.C. Cir. 1993) 8

STATUTES

18 U.S.C. § 921(a)(20) 14

18 U.S.C. § 922(g) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

18 U.S.C. § 922(g)(1) 14

18 U.S.C. § 924(d)(1) 15

42 U.S.C. § 1983 15

OTHER AUTHORITIES

1 Stephen P. Hallbrook, *Firearms Law Deskbook* (2014-2015 Ed., 2013) 9

94 C.J.S. *Weapons* § 45 (2014) 6

94 C.J.S. *Weapons* § 46 (2014) 6

Mark I. Rabinowitz, Note, *Criminal Law Constructive Possession: Must the Commonwealth Still Prove Intent? – Commonwealth v. Mudrick*, 60 Temple L.Q. 445 (1987) 5

Michael S. Deal, Note, *United States v. Walker: Constructive Possession of Controlled Substances: Pushing the Limits of Exclusive Control*, 2 J. Pharmacy & L. 401 (1994) 5

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

CRPA Foundation is a nonprofit organization, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"). CRPA Foundation promotes and encourages firearms and hunting safety and education; educates individuals with respect to firearms, firearm history, firearms technology, hunting, safety and marksmanship; and supports law enforcement and various charitable, educational, scientific, and other firearms-related public interest activities that support and defend the Second Amendment rights of all law-abiding Americans. CRPA Foundation has filed many *amicus curiae* briefs in federal courts, and has previously filed a brief in support of petitioners in *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

Gun Owners of California ("GOC") is a nonprofit organization exempt from federal income tax under IRC section 501(c)(4). GOC is the leading voice in the state of California, supporting the rights to self-defense and to keep and bear arms guaranteed by the Second Amendment. GOC monitors government

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[1] It is hereby certified that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. Petitioner has filed with the Clerk a letter granting blanket consent to the filing of *amicus curiae* briefs. The Respondent's letter granting consent to file this brief is on file with the Clerk.

activities at the national, state, and local levels that may affect the rights of the American public to choose to own a firearm. GOC has previously filed *amicus curiae* briefs in federal court, including a brief in support of respondents in the watershed Second Amendment case *District of Columbia v. Heller*, 554 U.S. 570 (2008).

Calguns Shooting Sports Association ("CGSSA") is a nonprofit organization exempt from federal income tax under IRC section 501(c)(4). CGSSA seeks to encourage firearms owners to meet at ranges to promote a constantly developing community; to empower this community with information about the political landscape and the future of shooting sports options in California; and to encourage the community to reach out to others through education and community development events. CGSSA has filed *amicus curiae* briefs in federal courts.

Kansas State Rifle Association ("KSRA") is a 501(c)(4) member association, formed for the purpose of communication and cooperation for all those interested in shooting, reloading, collecting, and other endeavors related to firearms. KSRA seeks to promote and encourage firearm safety, education, shooting competitions, wildlife conservation, and other firearm-related pursuits. KSRA's fundamental goal is to preserve the American heritage as exemplified and engendered in the Declaration of Independence, the Constitution, and the Bill of Rights for all citizens of the United States. KSRA has previously filed *amicus curiae* briefs in federal court, including briefs

in support of respondents in *District of Columbia v. Heller* and petitioners in *McDonald v. City of Chicago*.

SUMMARY OF ARGUMENT

The *amici* organizations write to respectfully direct the Court's attention to two fundamental errors underlying the Eleventh Circuit's decision.

First, the court incorrectly found that firearm owners are precluded from transferring firearms to third parties following a felony conviction because of a concern that the individual might retain possession of the firearms. The court's conclusion stemmed from a mistaken belief that the transfer would place him in constructive possession of firearms in violation of 18 U.S.C. § 922(g). This view conflicts with a wealth of case law holding that, absent evidence the prohibited individual would actually exert dominion or control over the firearm, such transfers would not place him or her in constructive possession.

Second, the court effectively endorsed the continued ownership of firearms by felons while their guns are held by the government, either indefinitely or pending a forfeiture proceeding. In light of the clear purpose of Section 922(g) to remove firearms from felons, the Eleventh Circuit's decision should be reversed to allow recently convicted individuals to divest themselves of any ownership interest in their firearms. This will also encourage recently convicted

individuals to comply with federal law by turning their firearms over to law enforcement, rather than concealing possession or transferring them through unlawful channels.

Reversal is necessary to ensure that prohibited individuals are permitted to transfer their firearms to appropriate third parties, thus preventing these individuals from being deprived of the value of their property, while simultaneously encouraging compliance and promoting transparent firearm transactions.

ARGUMENT

I. ALLOWING MR. HENDERSON TO SELL OR TRANSFER HIS LAWFULLY OWNED, NON-CONTRABAND FIREARMS TO AN APPROPRIATE THIRD PARTY WOULD NOT GIVE HIM CONSTRUCTIVE POSSESSION OF A FIREARM IN VIOLATION OF 18 U.S.C. § 922(g)

In this case, the Eleventh Circuit held that the government cannot transfer or sell a firearm on behalf of an individual who has recently become prohibited from possessing firearms as a result of a conviction. The court's decision was based, in large part, upon a concern that doing so would deliver "constructive possession of firearms to a convicted felon" in violation of 18 U.S.C. § 922(g). *United States v. Henderson*, 555 Fed. App'x 851, 853 (11th Cir. 2014) (citing *United States v. Howell*, 425 F.3d 971, 976-77

(11th Cir. 2005)). This holding was in error. Although the court did not articulate why the transfer would amount to constructive possession, it is well settled that such possession requires a finding that the individual intends to exert some control over the arms at issue. Because there is no evidence that Mr. Henderson would retain any control over his firearms if they are transferred to an appropriate third party, the court erred in concluding that the government is foreclosed from transferring them on his behalf.

"'Constructive possession is a legal fiction created by courts to find possession where it does not exist in fact.'" *United States v. Jenkins*, 90 F.3d 814, 822 (3d Cir. 1996) (citing Michael S. Deal, Note, *United States v. Walker: Constructive Possession of Controlled Substances: Pushing the Limits of Exclusive Control*, 2 J. Pharmacy & L. 401 (1994)). This judicial doctrine was created to enable "law enforcement officials to prosecute individuals in situations where the inference of possession is strong, yet actual possession at the time of arrest [could not] be shown." Mark I. Rabinowitz, Note, *Criminal Law Constructive Possession: Must the Commonwealth Still Prove Intent? – Commonwealth v. Mudrick*, 60 Temple L.Q. 445, 449-50 (1987).

Courts are generally in agreement that, for purposes of Section 922(g), constructive possession exists when a defendant "knowingly has the power or right, and intention to exercise dominion and control over [a] firearm," either directly, or through others. *United States v. Perez*, 661 F.3d 568, 576 (11th Cir.

2011); *see also United States v. Caldwell*, 423 F.3d 754, 758 (7th Cir. 2005); *Jenkins*, 90 F.3d at 817-18; *United States v. Payton*, 159 F.3d 49, 56 (2d Cir. 1998); 94 C.J.S. *Weapons* § 45 (2014). Whether constructive possession exists, however, is necessarily a fact-specific inquiry, requiring courts to examine the totality of the circumstances and determine whether there is substantial evidence that the person had dominion and control over the firearm. *See United States v. Lawing*, 703 F.3d 229, 240 (4th Cir. 2012); 94 C.J.S. *Weapons* § 46 (2014). Such a finding "must be based on more than speculation." *United States v. Bonham*, 477 F.2d 1137, 1138 (3d Cir. 1973) (en banc).

To date, the Eleventh Circuit has not reasoned why a prohibited person would be placed in constructive possession of a firearm as a result of transferring his or her firearms to a third party. Nor has any other circuit. But it is evident that the concern lies in the risk that the recipient might either return the firearm to the now-prohibited owner or follow his directions. Indeed, as the government argues: allowing a convicted felon to transfer his firearms to a third party "create[s] a significant risk that [he] would retain custody or control over the firearms, in violation of Section 922(g)." Resp't Br. Opp'n Cert. at 9.

Although it is certainly true that a convicted felon would retain constructive possession over a firearm if it is transferred to someone who accepts the felon's instructions as to the disposition of the firearm, *see United States v. Miller*, 588 F.3d 418, 419 (7th Cir. 2009), no other court has found a convicted

felon to be in constructive possession simply because there is a *risk* that he or she *might* exert control over it. To the contrary, courts have routinely found that constructive possession does not exist absent evidence the defendant knowingly and intentionally exerted dominion and control over the firearm, even in cases where there is a risk a person could access or control it.

For example, in *United States v. Griffin*, 684 F.3d 691 (7th Cir. 2012), the Seventh Circuit found that a felon who lived in his parents' home was not in constructive possession of his father's shotgun that was stored behind the kitchen door and easily accessible to him. *Id.* at 693-94, 698-99. Although there was certainly a risk that the individual could access the shotgun, the court explained that this was insufficient to establish that the defendant "intend[ed] to exercise control over" the firearm – as constructive possession requires. *Id.* at 698.

Similarly, in *United States v. Grubbs*, 506 F.3d 434 (6th Cir. 2007), the Sixth Circuit found that a felon who was temporarily staying in his mother's house did not constructively possess a firearm that was discovered unsecured in his brother's room. *Id.* at 436-37, 440. Despite the clear risk that the individual could access the firearm, the Sixth Circuit reversed the defendant's conviction because these circumstances were insufficient to establish that he in fact exercised dominion and control over it. *Id.* at 440-41. As the court explained, although the defendant was sleeping on a couch down the hall from the firearm,

nothing more than "mere conjecture" connected the defendant to his brother's gun at the time of arrest. *Id.* at 440. Without any evidence establishing the defendant knowingly had control over the firearm, the court held there was no evidence the defendant constructively possessed it. *Id.* at 443.[2]

The Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") has issued advisory opinions further confirming the risk that a person might exert dominion and control over firearms does not amount

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[2] *See also, e.g.*, *United States v. Gunn*, 369 F.3d 1229, 1235-36 (11th Cir. 2004) (defendant not in constructive possession of a firearm when he knew about the firearms, but they were located in another person's car because there was no evidence that he intended to exert dominion and control over them); *United States v. Thomas*, 321 F.3d 627, 636 (7th Cir. 2003) (noting that even when a felon "continues to have weapons in his home that he legally obtained before his felony convictions, he is not guilty of violating 18 U.S.C. 922(g) without a showing that he exercised control over the firearms"); *United States v. Mills*, 29 F.3d 545, 549-50 (10th Cir. 1994) (defendant not in constructive possession of a firearm when the defendant's housemate removed firearms from the garage of the house and placed them in a compartment of the dining table because there was no evidence that the defendant knowingly exercised dominion and control over them); *United States v. Zeigler*, 994 F.2d 845, 848 (D.C. Cir. 1993) (defendant not in constructive possession of cocaine that was locked in the laundry room of her boyfriend's apartment where there was no evidence that she had the ability to exert dominion over the drugs); *United States v. Kelso*, 942 F.2d 680, 681-82 (9th Cir. 1991) (rejecting government's argument, offered in support of sentencing enhancement, that the defendant passenger constructively possessed a firearm discovered behind the driver's seat because there was no evidence of dominion and control).

to constructive possession. *See* 1 Stephen P. Hallbrook, *Firearms Law Deskbook* 219-20 (2014-2015 Ed., 2013). For instance, in one opinion letter, the ATF explained:

> [A] prohibited person could reside in a residence where firearms were maintained without being considered in possession of those firearms if they are stored or located where the prohibited person is without the ability to exercise dominion and control over them. For example, if the firearm is located in a locked enclosure to which the person has no access, the prohibited person *would not be considered to be in actual or constructive possession of the firearm.*

Id. at 219 (citing Acting Assistant Director, Criminal Enforcement, CC-32, 505, FE:LLEN (Mar. 30, 1983), in ATF Responses to Freedom of Information Act Request, CM:D:EAO, 920582 (Oct. 30, 1992)) (emphasis added).

In each of the scenarios discussed above, there would be a significant risk that a prohibited individual might possess the firearms or retain control over their disposition. Yet, these circumstances alone did not amount to constructive possession because there was no evidence that these individuals had the knowledge or intent to exert dominion and control over them.

Here, Mr. Henderson requested that his firearms be transferred to his wife or to a third party acquaintance, both of whom are suitable recipients.

See Miller, 588 F.3d at 420 (finding Section 922(g) does not prohibit the government from transferring or gifting the firearms to "friends or relatives"). There is no evidence that Mr. Henderson would exert any dominion or control over the firearms once they are transferred. And there is no indication that either of the recipients would be subject to Mr. Henderson's direction or control.

The only argument offered by the government to support a theory of constructive possession is the contention that the transfer could "possibly" allow Mr. Henderson to exert control over the firearms. Resp't Br. Opp'n Cert. at 9. Again, this is simply not sufficient to place him in constructive possession. But even if "risk" or "possibility" were the correct legal standard, such risk could be alleviated through means much less severe than the effective forfeiture of the value of one's firearm collection. For example, the firearms could be transferred to a licensed dealer for resale. To state the obvious, authorizing the government to transfer firearms to a third party retailer that is of no relation to the prohibited individual would not create a risk or possibility that the individual would retain control over the firearms.

Understandably, the courts may be concerned that authorizing the transfer of a convicted felon's firearms to a third party raises the potential that the prohibited individual may someday come into actual or constructive possession of those firearms again. But courts are well within their powers to implement appropriate safeguards to "prevent [a felon] from

constructively possessing the weapons and to ensure that they are properly sold and not otherwise misused." *United States v. Zaleski*, 686 F.3d 90, 93-94 (2d Cir. 2012). As Judge Easterbrook explained while writing for the Seventh Circuit, a court can condition the transfer "on the recipient's written acknowledgement that returning the guns to [the felon] or honoring his instructions would aid and abet" a felon in the unlawful possession or attempted possession of a firearm. *Miller*, 588 F.3d at 420. Further, procedures could be established to account for sales and disbursements, and a deadline for their sale could be imposed. *Zaleski*, 686 F.3d at 93-94.

But categorically prohibiting the government from transferring or selling firearms on behalf of a convicted felon, such as Mr. Henderson, to a third party based on speculation that the individual could constructively possess the firearms, would "stretch the concept of 'constructive possession' much too far. " *United States v. Brown*, 754 F. Supp. 2d 311, 315 (D. N.H. 2010) (McAuliffe, C.J.). As the Second Circuit correctly explained, there is no concern over constructive possession if the transfer "would in fact strip [the individual] of any power to exercise dominion and control over" the firearms directly or through the recipient. *Zaleski*, 686 F.3d at 93 (italics omitted).

Because there is no evidence that Mr. Henderson would exert dominion and control over the firearms or that a third party recipient would be under his control, the court's concerns over constructive possession were unfounded, and its decision was in error. *Amici*

respectfully request that the Court reverse the decision of the Eleventh Circuit, thus restoring the rights of recently prohibited individuals to transfer their lawfully acquired, non-contraband firearms to appropriate third parties.

II. BARRING A PROHIBITED PERSON FROM TRANSFERRING OR SELLING HIS LAWFULLY OWNED FIREARMS CONTRAVENES SECTION 922(g)'s LEGISLATIVE INTENT AND OTHER IMPORTANT POLICY CONSIDERATIONS

Title 18 U.S.C. § 922(g) has one clear purpose: "to keep guns out of the hands of those who have demonstrated that 'they may not be trusted to possess a firearm without becoming a threat to society.'" *Scarborough v. United States*, 431 U.S. 563, 572 (1977). But it was not intended to completely bar an individual from divesting himself of his firearms by transferring or selling them to a third party following a conviction that forbids firearm possession.

In enacting the Gun Control Act of 1968 – of which Section 922(g) is a part – Congress expressed a deep concern with the availability of firearms "to those whose possession thereof was contrary to public interest." *Huddleston v. United States*, 415 U.S. 814, 824 (1974). As this Court has recognized, Congress passed the Gun Control Act because of a:

> concern with keeping firearms out of the hands of categories of potentially irresponsible

> persons, including convicted felons. Its broadly stated principal purpose was "to make it possible to keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency." S. Rep. No. 1501, 90th Cong., 2d Sess., 22 (1968). *See also* 114 Cong. Rec. 13219 (1968) (remarks by Sen. Tydings); *Huddleston v. United States*, 415 U.S., at 824-825. Congressman Cellar, the House Manager, expressed the same concern: "This bill seeks to maximize the possibility of keeping firearms out of the hands of such persons." 114 Cong. Rec. 21784 (1968); *Huddleston v. United States*, 415 U.S., at 828.

Barrett v. United States, 423 U.S. 212, 220-21 (1976).

Given this principal purpose, Congress plainly did not intend to prevent persons prohibited from possessing firearms from ridding themselves of any ownership interest in their firearms entirely. *Cf. United States v. Mason*, 233 F.3d 619, 625 (D.C. Cir. 2000) (recognizing that "it is the retention of [a firearm], rather than the brief possession for disposal, which poses the danger which is criminalized by felon-in-possession statutes.") (internal quotes omitted). Indeed, allowing an individual to transfer or sell his or her firearms following a conviction *furthers* the spirit of the Act. It would terminate any property interest an individual has in the firearms, ensuring that they are kept from persons that "Congress [has] classified as potentially irresponsible and dangerous." *Barrett*, 423 U.S. at 218.

The Eleventh Circuit's decision strays from this purpose. By prohibiting Mr. Henderson from transferring his firearms to a third party, the court effectively *requires* him to retain an ongoing property interest in his firearms indefinitely.[3] And it requires him to do so even though he has voluntarily sought to remove the firearms from his ownership and possession altogether. It strains reason to suggest that the goal of keeping firearms out of the hands of prohibited individuals would be furthered by forcing them to retain ownership interests in the very arms they are legally barred from possessing. *See* 18 U.S.C. § 922(g)(1). By forbidding individuals from completely divesting themselves of their firearms following a prohibiting conviction, the Eleventh Circuit's decision runs counter to congressional intent.

Authorizing individuals to transfer away their firearms following a prohibiting offense would also advance other important policy goals. It would encourage individuals to voluntarily turn their firearms over to the government, as they would no longer fear losing the economic value of their collections. And it would encourage them to transfer away any ownership interests in the firearms to a third party through

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[3] Currently, Mr. Henderson could seek to restore his firearm rights by requesting a pardon. 18 U.S.C. § 921(a)(20). *See Miller*, 588 F.3d at 420 (explaining the options for restoring a convicted felon's firearm rights, and that appropriations riders have hampered the ability to seek other forms of rights restoration).

lawful means – as opposed to selling them on the black market to recover their value.

From the government's perspective, it would reduce the cost of storing a person's firearms for an indefinite period of time.[4] Moreover, it would avoid any unnecessary litigation to recover the value of the firearms. *See Miller*, 588 F.3d at 419-20 (recognizing that while courts have agreed that a person could bring a claim to recover the value of firearms destroyed or held by the government, "[i]t is hard to see how either the United States or [the defendant] can be made better off by replacing an actual sale with litigation. "); *see also Howell*, 425 F.3d at 977 n.4 (implying that the defendant could file another action under 42 U.S.C. § 1983 for the value of the firearms).

In sum, it makes little sense to require a convicted felon to retain ownership over firearms he has voluntarily sought to divest himself of outright. Authorizing the proper transfer of firearms to non-prohibited third parties will promote Section 922(g)'s goal of foreclosing firearm ownership by prohibited persons, while simultaneously encouraging statutory compliance and promoting judicial economy.

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[4] Although the government could institute forfeiture proceedings, it must do so within 120 days of seizure. 18 U.S.C. § 924(d)(1).

CONCLUSION

For these reasons, the decision of the Eleventh Circuit should be reversed.

Respectfully submitted,

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Supreme Court of the United States

TONY HENDERSON, *Petitioner*,
v.
UNITED STATES, *Respondent*.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

Brief *Amicus Curiae* of Gun Owners of America, Inc., Gun Owners Foundation, U.S. Justice Foundation, Lincoln Institute for Research and Education, Abraham Lincoln Foundation, Institute on the Constitution, Conservative Legal Defense and Education Fund, and Policy Analysis Center in Support of Petitioner

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT

I. THE DOCTRINE OF "CONSTRUCTIVE POSSESSION" DOES NOT APPLY WHERE A CONVICTED FELON SEEKS A FIREARMS TRANSFER TO RID HIMSELF OF ALL INCIDENTS OF OWNERSHIP 4

II. THE GOVERNMENT HAS NO AUTHORITY TO CONVERT PETITIONER HENDERSON'S FIREARMS COLLECTION TO ITS OWN USE 10

III. THE GOVERNMENT'S INDISCRIMINATE USE OF THE "CONSTRUCTIVE POSSESSION" DOCTRINE INFRINGES SECOND AMENDMENT RIGHTS 17

CONCLUSION 24

TABLE OF AUTHORITIES

	Page
U.S. CONSTITUTION	
Amendment II	4, *passim*
STATUTES	
18 U.S.C. § 921(a)(20)(A)	9
18 U.S.C. § 922(g)(1)	2, *passim*
18 U.S.C. § 922(q)(3)(A)	8
18 U.S.C. § 981(a)(1)(C)	11
21 U.S.C. § 841(a)(1)	4
Firearms Owners Protection Act, Pub. L. 99-308	18
Gun Control Act of 1968, Pub. L. 90-618	7
CASES	
Caplin & Drysdale v. United States, 491 U.S. 617 (1989)	13
District of Columbia v. Heller, 554 U.S. 570 (2008)	19, 20, 21
Kaley v. United States, ___ U.S. ___, 188 L.Ed.2d 46 (2014)	16
Scarborough v. United States, 431 U.S. 563 (1977)	9
Tumey v. Ohio, 273 U.S. 510 (1927)	16, 17
United States v. Bean, 537 U.S. 71 (2002)	18
United States v. Felici, 208 F.3d 667 (8th Cir. 2001)	5, 6
United States v. Howell, 425 F. 3d 971 (11th Cir. 2005)	7, 9
United States v. Jackson, 390 U.S. 570 (1968)	23

United States v. Kaley, 677 F.3d 1316 (11th Cir. 2012) 16
United States v. Lopez, 514 U.S. 549 (1995) 8
United States v. Miller, 588 F.3d 418 (7th Cir. 2009) 10
United States v. Stanko, 491 F.3d 408 (8th Cir. 2007) 9
United States v. Thompson/Center Arms Co., 504 U.S. 505 (1992) 6
United States v. Turnbough, 1997 U.S. App. LEXIS 11886 (7th Cir. 1997) 6
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MISCELLANEOUS
P Bump, "The rarity of a federal grand jury not indicting, visualized," The Washington Post, November 24, 2014 23
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J. Cribbet, Property Law 10
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H. Rep. 90-1577 8
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"Your local police may be selling confiscated guns," Lawyers.com 15

INTEREST OF THE *AMICI CURIAE*[1]

Gun Owners of America, Inc. and The Abraham Lincoln Foundation for Public Policy Research, Inc. are nonprofit social welfare organizations, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). Gun Owners Foundation, U.S. Justice Foundation, The Lincoln Institute for Research and Education, Conservative Legal Defense and Education Fund, and Policy Analysis Center are nonprofit educational organizations, exempt from federal income tax under IRC section 501(c)(3). Institute on the Constitution is an educational organization.

These organizations were established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research and to inform and educate the public on important issues of national concern, the construction of state and federal constitutions and statutes related to the rights of citizens, and questions related to human and civil rights secured by law, including the defense of the rights of crime victims, the rights to own and use firearms, and related issues. Each organization has filed many *amicus curiae* briefs in this and other courts.

These *amici* filed *amicus curiae* briefs in the following recent asset forfeiture cases in this Court:

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

- Kaley v. United States, ___ U.S. ___, 188 L.Ed.2d 46 (2014)[2]

- Luis v. United States, No. 14-419, On Petition for *Certiorari* (pending) (Nov. 26, 2014)[3]

SUMMARY OF ARGUMENT

The Government has erroneously assumed that, upon conviction of a felony, the federal ban on a convicted felon "possess[ing]" a firearm automatically erases all rights of ownership to all of the convicted felon's firearms. Thus, the Government would deprive any such felon of any opportunity even to convey title to those firearms — even though the firearms were not involved in any crime and even though the person to whom the firearms are to be conveyed is lawfully permitted to receive them. According to the Government's theory, any such conveyance would necessarily violate 18 U.S.C. § 922(g)(1) because the felon could not convey title to the firearms without taking "constructive possession" of them and, therefore, such a conveyance cannot be countenanced as a matter of public policy.

The Government has given no reason why a proposed transfer of title of a felon's firearms must be deemed an act of "constructive possession." To the

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[2] http://www.lawandfreedom.com/site/constitutional/KaleyvUS_amicus.pdf.

[3] http://www.lawandfreedom.com/site/constitutional/Luis%20USJF%20Amicus%20Brief.pdf.

contrary, the Government has assumed that "constructive possession" is the equivalent of "actual possession." In fact, however, "constructive possession" is a legal fiction to be discriminately applied to only those cases where, on the basis of the specific policies at issue in each case, a person's relationship to the property in question cannot constitute anything but physical possession.

Such is not the case where, as here, a felon seeks only to exercise his ownership right to convey title, without being in actual possession of the thing conveyed. Moreover, such is not the case where, as here, the act dispossesses the felon of the firearms, thus actually furthering the policy of 18 U.S.C. § 922(g)(1) to keep firearms out of the hands of persons deemed by the Government to threaten public safety.

Not only does the Government's "constructive possession" argument fail to further the underlying policy of federal firearms laws, but also as employed here, it would undermine the nation's property forfeiture laws, completely bypassing the substantive and procedural protections designed to afford due process of law before depriving a person of his property rights. Indeed, application of the constructive possession doctrine to the facts of this case would enable the Government to deprive the rightful owner of private property which is neither contraband, nor an instrumentality of a crime, nor the fruit of any criminal activity. It would enable the Government to take that property without even a smidgeon of evidence that the Government has a superior property right.

Finally, the Government's misuse of the "constructive possession" doctrine infringes the Second Amendment right to keep and bear arms. The federal felony ban was enacted into law in 1968 on the erroneous assumption that the right to keep and bear arms was not an individual right, and that ownership rights in firearms were subject to the discretion of the Government. In 2008, this Court ruled to the contrary. The Government's use of the "constructive possession" doctrine here infringes on the marketplace of constitutionally protected arms secured to the People by the Second Amendment.

Moreover, rather than treating firearms as a class of property entitled to special constitutional protection, the courts below isolate firearms for *de facto* forfeiture to the federal Government, treating them as a most highly disfavored category of personal property. According to the rule approved below, any gun owner indicted for a felony would need to preemptively forfeit his Second Amendment rights and dispose of his entire firearms collection upon indictment in order to protect his and his family's financial well-being.

ARGUMENT

I. THE DOCTRINE OF "CONSTRUCTIVE POSSESSION" DOES NOT APPLY WHERE A CONVICTED FELON SEEKS A FIREARMS TRANSFER TO RID HIMSELF OF ALL INCIDENTS OF OWNERSHIP.

Without question, upon Petitioner Henderson's conviction for violating 21 U.S.C. § 841(a)(1),

Henderson did not physically "possess" any of the firearms at issue in this case. Indeed, he was attempting to dispossess himself of them. In compliance with a request of the U.S. Magistrate Judge, Henderson had relinquished physical possession, transferring his firearms to the Federal Bureau of Investigation ("FBI"). However, after conviction and after serving his sentence, Henderson requested transfer of his firearms to a purchaser, but the Government took the position that such a transfer would require Henderson to unlawfully "possess" those firearms in violation of 18 U.S.C. § 922(g)(1).[4] Employing a new variant of the doctrine of "constructive possession," the Government successfully blocked the transfer, convincing the courts below that it was possible for Henderson to unlawfully "possess" his firearms even without actual physical possession.

The Government has erroneously assumed that, for the purpose of enforcement of 18 U.S.C. § 922(g)(1), what it terms "constructive possession" is the legal equivalent of "actual possession." *See* Brief for the Government in Opposition ("Govt. Br.") at 6. *See also* United States v. Zaleski, 686 F.3d 90, 92-93 (2d Cir. 2012). For this proposition, the Government relies heavily upon United States v. Felici, 208 F. 3d 667 (8th Cir. 2001), which summarily stated that a felon's

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[4] The Government did not charge Henderson with violation of section 922(g)(1) for making the attempt to transfer his firearms collection to a third party, but the Government's creative theory of constructive possession is so encompassing that it could be applied to criminalize the assertion of control over the firearms inherent in even making such a request.

request "to have the firearms held in trust for him by a third party ... **suggests** constructive possession." *Id.* at 670 (emphasis added).

Overlooked by the Government is the fact that the unmodified term "possession" as used in section 922(g)(1) and "constructive possession" are not interchangeable. Harvard Professors A. James Casner and W. Burton Leach describe "constructive possession" as a doctrine where "'possession' is used in a Pickwickian sense, signalized by the word 'constructive.'" Whenever this "legal fiction" is employed, they caution, it is "important [to] diagnose the ends they seek to attain and the methods by which they operate."[5] A. J. Casner & W. B. Leach, Cases and

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[5] The doctrine of constructive possession of firearms has been invoked previously by the Government in a variety of situations which involve physical possession — which is absent in the instant case.

The court allowed possession of a firearm to be proved by defendant's dominion and control over the residence where the firearm was located. The Government "presented evidence from which a jury reasonably could conclude that Turnbough exercised dominion and control over the residence. ... This evidence, when taken together, was sufficient for a reasonable jury to conclude that Turnbough ... possessed the handgun." United States v. Turnbough, 1997 U.S. App. LEXIS 11886, *6-7 (7th Cir. 1997).

A similar doctrine was invoked in an effort to criminalize the simultaneous possession of firearms-related items, each of which may be possessed lawfully, but which could be combined in a variety of ways, including into an unlawful firearm. However, this Court rejected the Government's broad theory, requiring only that "a set of parts that could be used to make **nothing but** a short-barreled rifle ... must fall within the definition of 'making' such a rifle." United States v. Thompson/Center Arms Co., 504 U.S. 505, 510 (1992) (emphasis added).

Text on Property, at 53-54 (Little, Brown: 2nd ed. 1969).

Truly, lawful application of the "constructive possession" doctrine requires more than a "suggest[ed]" link between actual physical possession and constructive possession. Instead, any such application of the doctrine requires careful and precise analysis of the specific property interests involved. *See, e.g.*, Zaleski, 686 F.3d at 93-94.

However, following the Government's lead, the courts below contented themselves with the most cursory of analyses. In its opposition brief, the Government, quoting United States v. Howell, 425 F. 3d 971 (11th Cir. 2005), blankly asserted that considerations of "the public policy behind the law" justified reliance upon the "constructive possession" doctrine. Govt. Br. at 6. But neither the Government nor the Howell court troubled itself to ascertain what public policy actually lay behind 18 U.S.C. § 922(g)(1), much less to explain why that policy would justify the Government's claim against Henderson's right to transfer complete title to another person.

The 18 U.S.C. § 922(g)(1) ban on felon possession of a firearm was originally enacted into law as part of the Gun Control Act of 1968 ("GCA") "to provide support to Federal, State, and local law enforcement officials in their fight against crime and violence." Public Law 90-618, 82 Stat. 1213. According to House Report 1577, the "principal" purpose of the Gun Control Act was twofold:

> to strengthen Federal controls over interstate and foreign commerce in firearms and to assist the States effectively to regulate firearms traffic within their borders. [House Report No. 1577, reprinted in 3 U.S.C.C.A.N. at 4411(90th Cong. 2d Sess.:1968).]

GCA, in turn, reinforced the Omnibus Crime Control and Safe Streets Act of 1968, the purposes of which were to aid the state and local governments to [i] "keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency, and [ii] assist law enforcement authorities ... in combating the increasing prevalence of crime in the United States." *See* Senate Report ("S. Rep.") No. 1097, reprinted in 2 U.S.C.C.A.N. at 2113-14 (90th Cong., 2d Sess. 1968).

Exercising its power to regulate interstate and foreign commerce, Congress expressly designed the ban on felony firearms possession "to enable the States to [more] effectively cope with the firearms traffic within their own borders through the exercise of their police power." *Id.* at 2114. Thus, 18 U.S.C. § 922(g)(1) was never an absolute ban on all felon possessions of firearms, but only on those felons who "possess" firearms that "affect[] commerce," or on those firearms "receive[d]" by a felon, having previously "been shipped or transported in interstate or foreign commerce." With the federal Government having no plenary police power, Congress relied only on its authority under the Commerce Clause when it enacted this provision of the GCA. *See* United States v. Lopez, 514 U.S. 549 (1995). *See also* 18 U.S.C. § 922(q)(3)(A).

The policy underlying the federal ban, then, is not to penalize or punish a person for an act of intrinsic wrongdoing, as the Government and the Eleventh Circuit would have this Court believe. *See* Govt. Br. at 12 and Howell at 975-76. Rather, as this Court previously recognized: "Congress sought to rule broadly — to keep guns out of the hands of those who have demonstrated that 'they may not be trusted to possess a firearm without becoming a threat to society.'" Scarborough v. United States, 431 U.S. 563, 572 (1977). Furthermore, the original felony ban no longer applies to persons convicted of felonies such as "antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices." *See* 18 U.S.C. § 921(a)(20)(A). Rather, by narrowing the felon possession ban, Congress has reinforced the notion that the 18 U.S.C. § 922(g)(1) ban is a prophylactic measure to assist state and local governments to better fight crime by reducing the risk of harm to the public safety that is purportedly created by the flow of firearms coming from outside a state. *See* United States v. Stanko, 491 F.3d 408, 419-20 (8th Cir. 2007) (Bright, J., dissenting).

Allowing Henderson to exercise his ownership rights by effecting a sale of his firearms would have no adverse impact upon public safety whatsoever. Such a sale could be expected to be monitored by the FBI to ensure, through a National Instant Criminal Background Check System ("NICS") check, that the recipient is not prohibited from receiving the firearms. As the U.S. Court of Appeals for the Seventh Circuit has observed, although a person's firearms rights have

been "curtailed" by a conviction of violating 18 U.S.C. § 922(g)(1), the convicted person's "property interest in the firearms continues." United States v. Miller, 588 F.3d 418, 420 (7th Cir. 2009). And as the Seventh Circuit further points out, there are a number of alternatives — other than the one which would place the firearms into a convicted felon's possession — to effect a transfer of title of those firearms. *Id.* There is, then, no legitimate public policy reason to invoke the "constructive possession" doctrine in this case, for it is well-recognized that actual physical possession is not necessary to convey one's "title and ownership" in property. *See* J. Cribbet, Property Law at 13. In sum, the proposed sale of Henderson's firearms would not propel Henderson — or anyone else facilitating the transfer — into acting in violation of 18 U.S.C. § 922(g)(1).

II. THE GOVERNMENT HAS NO AUTHORITY TO CONVERT PETITIONER HENDERSON'S FIREARMS COLLECTION TO ITS OWN USE.

The Report and Recommendation of the U.S. Magistrate Judge who heard Petitioner Henderson's Motion to Return/Disposition of Property explained the course of criminal charges below. Shortly after his arrest on a controlled substance charge, which was alleged by a complaint, Henderson turned over his firearms collection to the FBI "as a condition of bond for pretrial release." Pet. App. 7a. Henderson was then the subject of an initial and two superseding felony indictments. "Each indictment contained a forfeiture provision seeking forfeiture of a house owned by Petitioner and his wife, but none of the indictments

sought forfeiture of the firearms."[6] Pet. App. 8a. Henderson pled guilty to a drug charge, and pursuant to that plea was adjudicated guilty of one felony drug charge. However, "[f]orfeiture was not pursued as to the house or other property," including Henderson's firearms.[7] *Id.*

Federal forfeiture powers, both civil and criminal, have mushroomed since they entered modern federal practice in 1970. *See generally* S. Cassella, "Overview of Asset Forfeiture Law in the United States," U.S. Attorneys' Bulletin (Nov. 2007).[8] The federal government provides prosecutors three types of forfeiture powers: administrative, criminal, and civil. *Id.* at 12-16. One statute alone — 18 U.S.C. § 981(a)(1)(C) — "authorizes the forfeiture of the proceeds of more than 200 different state and federal crimes." *Id.* at 10.[9] However, the Government's

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[6] In addition to taking possession of Henderson's firearms, the FBI reportedly attempted to confiscate the entire contents of his safe, including baseball trading cards and coins, beyond what the court ordered as conditions for bond. J.A. 179, n.1.

[7] The record does not reveal why forfeiture was not initially sought against the firearms, even though the Government had full knowledge (and indeed actual possession) of those firearms. Nor does the record reflect why forfeiture was not pursued against Petitioner's home or any of his other assets.

[8] http://www.justice.gov/sites/default/files/usao/legacy/2007/12/21/usab5506.pdf.

[9] The judiciary has already been too deferential to exercises of arbitrary power under asset forfeiture laws against the people, resulting in current policy being critically re-examined in

failure to pursue any of its vast array of forfeiture powers over Henderson's firearms collection reveals that the Government may not have believed that it could have obtained forfeiture of those firearms under any federal statute. Or, the Government may not have believed it necessary to comply with the statutory formalities of asset forfeiture because — as this case also demonstrates — the very same result could be obtained without compliance with the any of the federal statutes or rules governing forfeiture proceedings.

Although Henderson's status as a convicted felon deprived him of the right to "possess in or affecting commerce, any firearm or ammunition...." under 18 U.S.C. § 922(g), that statute grants the Government no interest in his firearms; indeed, the Government has not relied upon any statute to assert any possessory interest in the firearms. Rather, the Government has asserted only the possessory interest of a bailee. *See* Pet. Br. at 17.

Indeed, based on common law property principles, the Government could not claim a superior property interest in Henderson's firearms collection. There is no indication that any of the firearms in his collection were themselves unlawful *per se*, and thus they did not

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Congress, by the press, and even by former U.S. Department of Justice lawyers who once enforced asset forfeiture laws. *See, e.g.*, J. Yoder & B. Cates, "Government self-interest corrupted a crime-fighting tool into an evil," *Washington Post* (Sept. 18, 2014), http://goo.gl/pZmqLY.

constitute contraband.[10] There is no indication that any of the firearms in his collection were employed to facilitate a crime involving a controlled substance, and thus they were not the instrumentality of any crime.[11] How Henderson came to own these firearms is detailed below, providing no indication that these firearms were the fruits of a crime. *See* Appeal of Denial of Motion to Return Property under Rule 41(g), J.A. 178. Failing these three tests, the Government had no common law right whatsoever to the property, and certainly no property right superior to that of Henderson.

Indeed, the U.S. Magistrate Judge concluded that "the firearms were neither seized from Henderson...., nor constituted contraband, nor were they forfeited." Pet. App. 13a-14a. Nevertheless, the Magistrate Judge ruled that the firearms could not be sold by Henderson solely because he "did not attempt to transfer ownership of [them] to another person until *after* he had been adjudicated guilty and was a convicted felon." Pet. App. 14a.

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[10] "We do not deal with contraband, which the Government is free to seize because the law recognizes no right to possess it." Caplin & Drysdale v. United States, 491 U.S. 617, 653 n.15 (1989) (Blackmun, J., dissenting).

[11] "Nor do we deal with instrumentalities of crime, which may have evidentiary value, and may also traditionally be seized by the Government and retained even if the defendant is not proved guilty, unless a party with a rightful claim to the property comes forward to refute the Government's contention that the property was put to an unlawful use." *Id.*

Thus, the Government resorted to a curious legal theory that Henderson may not sell or transfer the firearms without taking "constructive possession" of the firearms — while the firearms remain in the custody of the FBI. Yet nowhere in the record below is there any evidence that the Government acquired title to these firearms or even made any other claim of a legal interest in these firearms. If Henderson's claim as their last rightful owner is denied, there being no other rightful claimant, it would be safe to assume that the Government will retain possession of the Henderson firearms collection, manifesting total dominion and control over the firearms at the conclusion of this case — if it has not done so already.

The U.S. General Services Administration has promulgated regulations that (i) govern the "disposition of seized, forfeited, voluntarily abandoned, and unclaimed personal property under the custody of any Federal agency located in the United States," and that (ii) provide, *inter alia*, that various types of firearms are transferred to the Department of Defense or other agencies. Part 102-41.[12] One could reasonably expect the Government to justify its full ownership of the Henderson firearms collection based on that collection having been "voluntarily abandoned" or being "unclaimed." Because there is no accountability to the Court or to the public for what becomes of these firearms, Henderson's firearms certainly could be sold, traded, or used in a variety of

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[12] http://www.gsa.gov/portal/ext/public/site/FMR/file/Part102-41.html/category/ 21858/.

ways by Government officials.[13] For example, the firearms might be placed at a federal training facility or a museum, or they might be transferred to local law enforcement. And it is possible that they might be destroyed.

In any of these scenarios, the Government will *de facto* have assumed full rights of ownership of these firearms, just as if title to those firearms had been forfeited to the state. Petitioner rightly points out that such a forfeiture would occur without any of the procedural protections that apply to statutory forfeitures. *See* Pet. Br. at 25-28. However, the problem is not just procedural, but also substantive, as this type of *de facto* forfeiture will have occurred without any common law justification or statutory authority. In a very real sense, the Government's pseudo-legal claim to possession may be succinctly described as: "Might Makes Right."

Petitioner also points out that 1.2 million felony convictions occur annually in the United States and that many of these persons own firearms. Pet. Br. at 30. For such persons, it no longer would matter that Congress has crafted carefully limited asset forfeiture

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[13] An investigation into the disposition of guns seized by Oklahoma police revealed that many are sold to firearms dealers, or traded for other guns. A. Iwasinski, "News 9 looks into what happens to guns seized by Oklahoma Police," News 9.com (Nov. 5, 2013), http://www.news9.com/story/23887989/news-9-looks-into-what-happens-to-guns-seized-by-oklahoma-police. *See also* "Your local police may be selling confiscated guns," Lawyers.com. http://criminal.lawyers.com/criminal-law-basics/your-local-police-may-be-selling-confiscated-guns.html.

statutes, for there would be no need for the Government to follow the law of asset forfeiture when the same result could be achieved, as it was here, in a much more facile fashion. In the absence of any such statutory authority, the Government never acquires lawful title to those firearms, but nonetheless asks the judiciary for license to act exactly as though it has exclusive title.[14]

Allowing the federal Government to engage in such *de facto* forfeiture creates a perverse financial incentive to indict and convict, which should never factor into the equation when a prosecutor is pursuing his duty.[15] Self-interest only serves to corrupt the

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[14] In a recent case to come before this Court, two defendants were successfully charged with converting used medical property which was not wanted or claimed by the hospital which previously had owned it and allowed the defendants to take it. To justify a charge against the couple involved in the subsequent sale of that property, the Government relied on the theory that even unclaimed property could be converted, using a creative theory of constructive trust. *See* United States v. Kaley, 677 F.3d 1316, 1319 (11th Cir. 2012). *See also* Kaley v. United States, ___ U.S. ___, 188 L.Ed.2d 46, 64 (2014). If Henderson is barred from making any lawful claim to regain his collection, it is not immediately apparent why that theory used in Kaley would not criminalize the disposition of Henderson's firearms collection by Government officials.

[15] Tumey v. Ohio, 273 U.S. 510 (1927) addressed a state statute which empowered a village mayor to function as a judge with respect to minor offenses, including determining guilt and the amount of the fine. Some of the fines generated were paid to the mayor personally, and some to the village over which he presided. The Court viewed the judge's interest in the financial prosperity of his employer, the village, just as problematic as the judge's

"spirit of fair play and decency that should animate the federal prosecutor." Attorney General Robert H. Jackson, The Federal Prosecutor (Apr. 1, 1940).

Having not invoked any asset forfeiture statute, and having alleged no superior property interest, the Government has no authority to convert Henderson's firearms collection to its own use.

III. THE GOVERNMENT'S INDISCRIMINATE USE OF THE "CONSTRUCTIVE POSSESSION" DOCTRINE INFRINGES SECOND AMENDMENT RIGHTS.

The ban on felon possession of firearms was enacted at a time when few believed that the Second Amendment secured an individual right to keep and bear arms. Indeed, relying on court decisions up to 1968, the Senate Report on the Omnibus Crime Control and Safe Streets Act stated that "the second amendment, unlike the first, was not adopted with the individual rights in mind, but is a prohibition upon Federal action which would interfere with the organization of militia by the states of the Union." *See* S. Rep. 1097 at 2 U.S.C.C.A.N. at 2169 (1968). Thus, the Report concluded that the then-current court "decisions make it plain that the amendment presents no obstacle to the enactment and enforcement of this title." *Id.* "To the contrary," the Senate Report

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personal self-interest. Thus, the judge was disqualified both "because of his direct pecuniary interest in the outcome, and because of his official motive to convict and to graduate the fine to help the financial needs of the village." *Id.* at 535.

concluded, the court decisions at that time "afford ample precedent for" the law, and "that no body of citizens other than the organized State militia, or other military organization provided for by law, may be said to have a constitutional right to bear arms." *Id.*

In 1986, in the Firearms Owners Protection Act ("FOPA"), Congress shifted its Second Amendment view somewhat, stating that it was a "right[] of citizens ... to keep and bear arms under the second amendment to the United States Constitution." *See* Public Law 99-308, Section 1(b)(1)(A), 100 Stat. 449 (1986). Pursuant to this finding, FOPA amended "18 U.S.C. § 925(c) to make any person prohibited from firearm ... possession ... eligible to apply for relief [i]n light of evidence ... that [GCA] charges have been abused in the past, with resultant convictions of persons not inclined to engage in any criminal activity." *See* Senate Committee of the Judiciary Report No. 98-583 at 26 (98th Cong., 2d Sess., 1986). While "making [such] relief available" was considered by the Senate Committee Report to be "essential," it was not made a matter of right, even though the Senate Judiciary Committee found that persons have been "arbitrarily" denied their rights. *Id.* Yet none of the promised discretionary relief has been forthcoming, Congress having barred the use of any appropriations to implement the relief afforded by this FOPA section. *See* United States v. Bean, 537 U.S. 71 (2002).

Instead, it has taken another 22 years for the Second Amendment to be recognized as a

constitutionally "enumerated ... right [which] takes out of the hands of government — even the Third Branch of Government — the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." District of Columbia v. Heller, 554 U.S. 570, 634 (2008). Yet, that is what the Government is attempting to do in this case, exercising unfettered discretion to take away Henderson's ownership rights in certain firearms on the pretext that, in order for him to sell those rights, he must be deemed to be illegally in possession of those firearms in order to effectuate that sale.

What is at stake here is not just Henderson's personal property rights, but the right of the People to have access to firearms on the open market among persons who are in no way disqualified from possessing a firearm. If Henderson's firearms cannot be sold, then they are subject to Government use or destruction, likely being taken out of the trade and commerce of constitutionally-protected firearms. In Heller, this Court ruled emphatically that the Second Amendment, like the First, Fourth, and Ninth, refers "unambiguously ... to individual rights, not 'collective' rights, or rights that may be exercised only through participation in some corporate body." *Id.* at 579. In protecting an individual right to keep and bear arms, the Second Amendment secures a right of private property in those arms that are protected by the Amendment. Specifically, the Heller Court asserted that the right to "keep" is a right "'[t]o have in custody[,]' '[t]o hold; to retain in one's power or possession.'" *Id.* at 582. "'Keep arms,'" the Court concluded, "was simply a common way of referring to

possessing arms, for militia men *and everyone else.*" *Id.* at 583.

Because the Second Amendment recognizes a right of private property in a protectable arm, it follows that such arms, like other private property, may be kept in one's home, and thus must be the subject of trade and commerce. *Id.* at 583, n.7. This right, in turn, is reinforced by the Second Amendment text securing the right "to bear," that is, "to carry." *Id.* at 584. Rejecting the notion that "bear" was limited to the carrying of a weapon "in an organized military unit," the Heller Court asserted that the Second Amendment secured the carrying of a protected arm for personal "confrontation," and thus, in one's ordinary clothing, not in military garb or other military issue. *See id.* at 584-590. Indeed, the Court found that the right to keep and bear arms was a preexisting right "secured to [the people] as individuals, according to 'libertarian political principles,' not as members of a fighting force" controlled by either the state or federal government. *Id.* at 593.

At the heart of the underlying libertarian political principles was the right of the people to be "trained in arms ... [the] better able to resist tyranny," as members of "a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down." *Id.* at 598-99. As a "right protecting against both public and private violence" (*id.* at 594), it is an essential principle that the Second Amendment protect the right of private property in firearms or, otherwise, "tyrants" would be free to "simply tak[e] away the people's arms" on the

basis of any pretext. *Id.* at 598. That prospect of a disarmed people at the discretion of the Government is precisely why the Second Amendment was inserted into the federal Bill of Rights. *Id.* at 598-600.

While Henderson's cache of firearms could be viewed to be of minimal significance in the overall availability of constitutionally-protected firearms in the marketplace, Petitioner rightfully points out that "property deprivations," such as Henderson's here, "are not rare occurrences": "There were more than 1,200,000 felony convictions in 2006." Pet. Br. at 30. "Were the Court to approve the Eleventh Circuit's rule," not only would all firearms owners convicted of a felony lose their economic interests in firearms, but the People would be deprived of a significant source of firearms for self-defense and defense of family and home.

The Government and the courts below would have this Court interpret section 922(g)(1) so broadly that anyone, immediately upon conviction of a felony, not only loses his right to possess firearms, but also loses the right to sell his firearms, and also forfeits all of his firearms to the Government, even though the firearms had no relation to the crime. To read the statute in such a way violates the Second Amendment, imposing a financial penalty on those Americans who enter the crosshairs of federal prosecutors, simply because they chose to exercise their constitutional right to keep and bear arms.

The knowledge that persons who are convicted of some felony are immediately dispossessed of both the

right to possess and to dispose of their firearms creates a substantial disincentive to the ownership and collection of firearms in the first place. As Petitioner points out, under the rule applied below, a person charged with a crime — rightly or wrongly — has the unenviable choice either to sell his firearms before the verdict, or else throw the dice and risk the forced loss of his firearms if convicted. Pet. Br. at 34.

Of course, liquidating a personal collection of firearms may be easier said than done. Used firearms typically do not command as great a price as new firearms, and thus a person may not obtain anywhere near the value he paid to obtain them. Many firearms are uncommon or rare, or of great value, and thus time is required to find the right buyer and obtain maximum value — time a person might not have when defending against criminal charges. Since firearms ownership is heavily regulated by federal law, persons under indictment likely would not wish to run the risk of selling their guns themselves, lest they make a mistake and face yet additional criminal charges.[16] Thus, the safest option would be to sell one's firearms through an auction house or auction website, each of which would take a healthy cut of the proceeds, or sell to a Federal Firearms Licensee at a deep discount. Finally, some percentage of criminal defendants are incarcerated during the course of the proceedings against them, and are simply unable to arrange to have their firearms sold in such circumstances. Taken

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[16] Indeed, in this case, the first person to whom Henderson was trying to sell his firearms collection backed out under pressure from the Government. J.A. 151.

as a whole, these and other factors mean that a person, simply by having been charged with a crime, would be forced to immediately liquidate his entire collection of firearms, possibly for substantially far less than their actual value, or else run the risk of losing them and their value forever. As Petitioner notes, this places a chilling effect[17] on the exercise of Second Amendment rights at the outset. Pet. Br. at 35.

This problem is further compounded by a criminal justice system (i) where grand juries almost never fail to indict,[18] (ii) where the federal criminal code is so vast that even law-abiding people with the best of intentions can commit serious federal crimes,[19] and (iii) where prosecutors "stack" charges and over-charge in an effort to coerce guilty pleas regardless of actual guilt.[20]

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[17] For another illustration of imposing an impermissible "chilling effect" on the exercise of constitutionally protected rights, *see, e.g.*, United States v. Jackson, 390 U.S. 570 (1968) (statute that required imposition of death penalty if recommended by the jury was unconstitutional because it discouraged criminal defendants from invoking their Sixth Amendment right to demand a jury trial).

[18] P. Bump, "The rarity of a federal grand jury not indicting, visualized," *The Washington Post* (Nov. 24, 2014), http://goo.gl/XdlbP1

[19] *See* H. Silverglate, Three Felonies A Day: How the Feds Target the Innocent (Encounter Books: 2011).

[20] *See* M. Finkelstein, "A Statistical Analysis of Guilty Plea Practices in the Federal Courts," 89 HARVARD L. REV. 293 (Dec. 1975) at 294.

It is debatable whether the text of the Second Amendment even permits the prohibition against convicted felons possessing firearms after they have served their time. *See* H. Titus, "Second Amendment: Rule by Law or By Judges," 8 LIBERTY UNIV. L. REV. 577, 599-603 (2014). However, it is abundantly clear that the Second Amendment does not permit a person's right to keep and bear arms to be extinguished simply because he has been accused of a crime. Yet if the Eleventh Circuit's decision is allowed to stand, a person's Second Amendment rights are put at risk if he chooses to await the disposition of the case against him. If he wishes to protect his ownership of his assets from potentially being terminated, he must voluntarily terminate ownership before a verdict, even if he has done nothing wrong. Even though convicted of no crime, he may no longer be able to assume the risk of keeping or bearing his firearms while awaiting trial — not even to protect himself and his family, or to hunt for food to feed them. Rather than have constitutionally protected status, firearms are singled out for confiscation and conversion. Such a perverse result should not be countenanced.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

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AMICUS CURIAE BRIEF

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Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	1
ARGUMENT	5
I. UNDER THE *ONE FORD COACH* CANON OF CONSTRUCTION, STATUTORY LANGUAGE MUST BE CONSTRUED TO AVOID FORFEITURES	5
II. THE DECISION BELOW TURNS THE *ONE FORD COACH* PRINCIPLE UPSIDE-DOWN	11
III. THE COURT SHOULD SEIZE THIS OPPORTUNITY TO REAFFIRM AND REINVIGORATE THE *ONE FORD COACH* PRINCIPLE	18
CONCLUSION	25

TABLE OF AUTHORITIES

Page(s)

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Cooper v. City of Greenwood,
904 F.2d 302 (5th Cir. 1990) 13, 14

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96 U.S. 395 (1878).....2

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91 U.S. 29 (1875).....8

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215 F.2d 69 (4th Cir. 1954) 9

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Page(s)

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21 U.S.C. § 881 9

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U.S. DEP'T OF JUSTICE, FY 2013 ASSET FORFEITURE FUND REPORTS: TOTAL NET DEPOSITS TO THE FUND BY STATE OF DEPOSIT 3, 19

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Zeke McCormack, *Former District Attorney Sentenced in Kerrville*, San Antonio Express-News, May 22, 2010 23

INTEREST OF *AMICUS CURIAE*[1]

The Institute for Justice is a nonprofit, public interest law firm committed to defending the essential foundations of a free society by securing greater protection for individual liberty and by restoring constitutional limits on the power of government. The Institute litigates civil forfeiture cases nationwide, in order to combat the use of the civil forfeiture laws to seize property without respect for due process of law. The Institute is filing this *amicus* brief in support of Petitioner because this case offers an important opportunity for the Court to address prosecutors' aggressive application of the forfeiture laws and the expansive interpretation of those laws adopted by the courts.

SUMMARY OF ARGUMENT

Nearly eighty years ago, in words that retain their relevance today, this Court observed that the "forfeiture acts are exceedingly drastic." *United States v. One 1936 Model Ford V-8 De Luxe Coach, Commercial Credit Co.*, 307 U.S. 219, 236 (1939) ("*One Ford Coach*"). In light of that concern, the Court articulated a simple but powerful principle of statutory

[1] All parties have consented to the filing of this brief. *Amicus* affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

construction: "Forfeitures are not favored; they should be enforced only when within both letter and spirit of the law." *Id.* at 226. The decision below contravenes that canon of construction. Faced with alternate interpretations of the felon-in-possession law, the Eleventh Circuit chose the interpretation that produces a *de facto* forfeiture – while disregarding reasonable interpretations that avoid that result. On that basis alone, the decision below should be reversed.

The *One Ford Coach* canon of construction is not only controlling in this case, but also resonates within the case's broader context. The Court decided *One Ford Coach* against the backdrop of the first great wave of forfeiture proceedings in the United States, arising out of Prohibition and its immediate aftermath.[2] As "drastic" as the forfeiture laws may have appeared at that time, however, the laws of that era appear quaint in comparison to the forfeiture laws today. We are, at present, roughly thirty years into a second great wave of forfeiture proceedings, associated, this time, not with alcohol but with the government's "War on Drugs."[3]

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[2] *See, e.g., J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505 (1921); *United States v. One Ford Coupe Auto.*, 272 U.S. 321 (1926); *Van Oster v. Kansas*, 272 U.S. 465 (1926); *cf. Dobbins's Distillery v. United States*, 96 U.S. 395 (1878) (early forfeiture case involving taxation of alcohol).

[3] *See generally* DAVID B. SMITH, PROSECUTION AND DEFENSE OF CIVIL FORFEITURE CASES § 1.01 (2014) (tracing the development

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The unprecedented scope of the forfeiture laws in our present era can be glimpsed in a single statistic: In 1986, the year the Department of Justice's Assets Forfeiture Fund was created, the fund took in just $93.7 million in deposits. By 2013, that figure had swollen to more than $2 *billion*.[4] Federal law allows

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of the forfeiture laws from "harsh and effective laws to deter smuggling and other attempts to evade payment of customs duties and excise taxes" to "a new era when forfeitures would become an integral part of modern law enforcement"); Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 Harv. L. Rev. 853, 868-69 (2014) (describing "long historical pedigree" of forfeiture in the U.S. and noting recent connection to government's anti-drug-trafficking enforcement activities); Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. Chi. L. Rev. 35, 42-45 (1998) (same). *See also* sources cited in Part III *infra*.

Most commentators point to the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 as the start of the recent wave of forfeiture activity. *See* SMITH, *supra*, at 1-5; *see also* Blumenson & Nilsen, *supra*, at 44-45. Three features of that statute are responsible, in large measure, for this expansion: (a) it authorized, for the first time, the forfeiture of property used (or intended to be used) to "facilitate" a drug offense, *see* 21 U.S.C. § 881(a)(6) & (7); (b) it allowed federal law enforcement agencies to retain and use the proceeds from forfeitures, instead of requiring that they be deposited in the Treasury's General Fund, *see* 28 U.S.C. § 524; and (c) it initiated the federal "Equitable Sharing Program," which gives state and local police agencies the lion's share of seized assets even when federal agents were involved in the arrest, *see* 21 U.S.C. § 881(e)(1)(A) and 19 U.S.C. § 1616a(c).

[4] *Compare* MARIAN R. WILLIAMS *ET AL.*, POLICING FOR PROFIT 31 (2010), available at http://www.ij.org/images/pdf_folder/other_pubs/assetforfeituretoemail.pdf., *with* U.S. DEP'T OF JUSTICE, FY 2013 ASSET FORFEITURE FUND REPORTS: TOTAL NET DEPOSITS TO

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the Department of Justice to retain proceeds from forfeitures in the Assets Forfeiture Fund, and to use those proceeds to fund law enforcement agencies.[5]

Commentators have decried the growth of forfeiture, explaining that the forfeiture laws "are producing self-financing, unaccountable law enforcement agencies divorced from any meaningful legislative oversight."[6] Indeed, two former Department of Justice officials involved in the creation of the current forfeiture regime recently opined that forfeiture "has turned into an evil itself, with the corruption it engendered among government and law enforcement coming to clearly outweigh any benefits."[7]

The instant case offers the Court an opportunity to take a small but important step to curb what has become a veritable nationwide forfeiture epidemic.[8] The Eleventh Circuit's strained and unnecessarily broad reading of the felon-in-possession statute – stretching a statutory provision prohibiting "possess[ion]" of

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THE FUND BY STATE OF DEPOSIT, available at http://www.justice.gov/jmd/afp/02fundreport/2013affr/report1.htm; *see also* Rep. Tim Walberg, *Op-Ed: Stopping the Abuse of Civil Forfeiture*, Washington Post, Sept. 4, 2014.

[5] *See* WILLIAMS, *supra* note 4; *see also* U.S. Dep't of Justice, The Fund, at http://www.justice.gov/jmd/afp/02fundreport/02_2.html.

[6] Blumenson & Nilsen, *supra* note 3, at 41.

[7] John Yoder and Brad Cates, *Op-Ed: Government Self-Interest Corrupted A Crime-Fighting Tool Into An Evil*, Washington Post, Sept. 18, 2014.

[8] *See* Part III *infra*.

firearms, 18 U.S.C. § 922(g), to cover any transfer of ownership of those firearms – works in practical effect a complete forfeiture of Mr. Henderson's property interest in his firearm collection. By adopting the *one* construction of the statute that *produces* forfeiture, absent any indication in the statute itself (or elsewhere) that Congress intended such a result, while rejecting reasonable alternative construction(s) that would *not* involve imposition of this "exceedingly drastic" remedy, *One Ford Coach,* 307 U.S. at 236, the Eleventh Circuit has turned the *One Ford Coach* principle completely on its head.

We urge the Court to reaffirm the *One Ford Coach* principle and to apply it here, reversing the Eleventh Circuit judgment while reminding lower courts of their duty to find reasonable ways to avoid imposing this particular remedy unless specifically and expressly directed to do so by Congress.

ARGUMENT

I. Under the *One Ford Coach* Canon of Construction, Statutory Language Must Be Construed to Avoid Forfeitures.

In *United States v. One 1936 Model Ford V-8 De Luxe Coach, Commercial Credit Co.*, 307 U.S. 219 (1939) ("*One Ford Coach*"), this Court articulated a straightforward canon of construction to apply where (as here) one alternate interpretation of a law would result in a forfeiture: the law should be interpreted to

avoid forfeiture wherever such an interpretation is reasonable.

The Court in *One Ford Coach* had to interpret the Liquor Law Repeal and Enforcement Act of 1935, 49 Stat. 872, 878, codified at 27 U.S.C. § 40a, which authorized forfeiture of automobiles used for "unlawful transportation of distilled spirits upon which the federal tax had not been paid." The law subjected purchasers of used cars to what has been called "Bootlegger Risk": the possibility that the automobiles they purchased could be seized and forfeited to the government as a result of activities undertaken by prior owners years before. To partially mitigate that risk, the Act allowed courts to remit forfeitures, and to restore title to the purchaser, if the purchaser could show that he or she had acted "in good faith." If, however, "it appear[ed]" that the purchaser's interest had been acquired from a person having a "record or reputation" for violating the liquor laws, the purchaser had to show that he or she (a) made an inquiry with law enforcement agencies as to "the character or financial standing" of that person, and (b) had been informed "in answer to his inquiry" that the person in question "had no such record or reputation." *Id.* at 222.

One Ford Coach called for application of this statutory scheme to somewhat unusual facts. The party seeking remittance of the forfeiture was an automobile finance company that had been assigned a sales contract for a vehicle sold to one "Paul Walker." Before accepting the assignment, the finance company

had inquired about Walker's character and financial standing with local law enforcement agencies and had been informed that his record was clean. *Id.* at 222-23. Unbeknownst to the finance company, however, *Paul* Walker was merely a "straw purchaser" of the vehicle, acting on behalf of the "real purchaser" – his brother, *Guy* Walker. *Id.* at 224. The finance company, unaware of the arrangement between the brothers, had made "no inquiry or investigation whatsoever," *id.* at 223, concerning *Guy* Walker; had they done so, they would have been informed that Guy Walker did indeed have a "previous record and reputation for violating both state and federal laws relating to liquor." *Id.* at 222.

The government argued that the forfeiture could not be remitted because the finance company had "made no adequate inquiry concerning the record and reputation of the real purchaser – Guy Walker," *id.* at 224, and the Court acknowledged that the statute, if "taken literally," *id.* at 235, supported that result. The Court stated that the literal terms of the statute "inhibit remission by the court unless one who claims an interest made actual inquiry concerning every person with record or reputation for violating the liquor laws who in fact . had acquired some right to the vehicle," and "[t]hus construed[,] the provision would require absolute forfeiture notwithstanding the claimant could not by the utmost diligence ascertain the true situation." *Id.*

But the Court refused to adopt that "literal[ ]" reading of the statute, instead articulating and then

applying a simple but powerful principle of statutory construction: "Forfeitures are not favored; they should be enforced *only when within both letter and spirit of the law*." *Id.* at 226 (emphasis added) (citing *Farmers' & Mechanics' Nat'l Bank v. Dearing*, 91 U.S. 29, 33-35 (1875) ("Courts always incline against [forfeitures]. *When either of two constructions can be given to a statute, and one of them involves a forfeiture, the other is to be preferred.*") (emphasis added) (citations omitted). It is not sufficient, the Court held, that the statutory provision in question "permit[s]," *id.* at 225, the construction urged by the government. Only where the intent to require forfeiture has been "expressed in language sufficiently plain to admit no reasonable doubt" should the statute be read as "requiring absolute forfeiture under such circumstances." *Id.* at 235. Finding no such plain statement, the Court ordered the forfeiture remitted.

The *One Ford Coach* principle, or canon, of statutory interpretation – directing courts to construe statutes narrowly so as to avoid forfeitures unless commanded by the "letter and spirit of the law," *id.* at 226, expressed in "unclouded language," *id.* at 236, that is "sufficiently plain to admit no reasonable doubt," *id.* at 235 – has great continuing vitality, as attested by the long list of lower court decisions that have relied upon it.[9] It underlies and helps to explain

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[9] *See, e.g., United States v. Real Prop.*, 261 F.3d 65, 74 (1st Cir. 2001) ("mindful of the well established rule that federal forfeiture statutes must be narrowly construed because of their

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potentially draconian effect," court holds that claimant satisfies requirements of the "innocent owner defense" and dismisses forfeiture action under 21 U.S.C. § 881(a)(7)); *United States v. Giovanelli*, 998 F.2d 116, 119 (2d Cir. 1993) (citing *One Ford Coach* and explaining that, while the forfeiture statutes give the Government "vast and important powers," those powers "must be exercised in the precise manner the statutes provide"); *Onwubiko v. United States*, 969 F.2d 1392, 1400 (2d Cir. 1992) (narrowly construing the "facilitation" requirement for drug-related-offense seizure under 21 U.S.C. § 881 to reverse denial of motion to return claimant's property, quoting *One Ford Coach* and noting that "[d]espite this fifty-odd-year-old command, forfeitures are becoming more frequent in number and more summary in nature"); *United States v. One 1980 Red Ferrari*, 875 F.2d 186, 188 (8th Cir. 1989) (citing *One Ford Coach*, noting that "forfeitures are not favored," and finding in the "sparse legislative history of 21 U.S.C. § 881" indication that "the federal forfeiture statute is to be strictly construed"); *United States v. $38,000.00 in United States Currency*, 816 F.2d 1538, 1547 (11th Cir. 1987) (citing *One Ford Coach* and placing "heavier" burden on the government than on claimants "to adhere to the procedural rules" governing forfeiture because "strict compliance with the letter of the law by those seeking forfeiture must be required"); *United States v. One 1976 Ford F-150 Pick-Up*, 769 F.2d 525, 527 (8th Cir. 1985) (invoking *One Ford Coach* principle to find that claimant's truck was not " 'substantially associated' " with drug offense to support forfeiture under 21 U.S.C. § 881(a)(4)); *Harris v. United States*, 215 F.2d 69, 72-73 (4th Cir. 1954) (reversing denial of claimant's motion to remit forfeiture under 18 U.S.C. § 3617(b)(3), finding "grounds to sustain a more lenient interpretation of the Act" based on *One Ford Coach* principle that statute "should be liberally interpreted in favor of remission"); *United States v. 434 Main St.*, 961 F. Supp. 2d 298, 319 (D. Mass. 2013) (narrowly construing the "substantial connection between the property and the offense" required for forfeiture under the Civil Asset Forfeiture Reform Act of 2000, 18 U.S.C. § 983(c), to remit forfeiture of claimant's motel; alternate reading of statute "would be inconsistent with 'both letter and spirit of the law' " (quoting *One Ford Coach*)); *United States v.*

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courts' hostility to *de facto* forfeitures – *i.e.*, measures achieving the "functional equivalent of forfeiture," *United States v. Miller*, 588 F.3d 418, 419 (7th Cir. 2009), without having to satisfy any of the constitutional and statutory safeguards applicable to forfeiture proceedings. *See Lee v. City of Chicago*, 330 F.3d 456, 466 (7th Cir. 2003) ("due-process guarantees" prevent government from using its "authority to seize [to] effect *de facto* forfeitures of property by retaining items indefinitely") (citing *United States v. Premises Known as 608 Taylor Ave.*, 584 F.2d 1297 (3d Cir. 1978)); *id.* at 1302 (noting "possible constitutional underpinnings" of rules against *de facto* forfeitures) (citing *United States v. Moore*, 423 F. Supp. 858 (S.D. W.Va. 1976)); *State v. Fadness*, 268 P.3d 17, 23 (Mont. 2012) (while it is "well settled that the government may seize evidence for use in investigations and trial," it may not, "by exercising its power to seize, effect a *de facto* forfeiture by retaining the seized property indefinitely") (citing *United States v. Rodriguez-Aguirre*, 264 F.3d 1195, 1212 (10th Cir. 2001)). And, as explored in greater detail in the

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One 1955 Ford 4-Door, 186 F. Supp. 547, 551 (E.D. Tex. 1960) (narrowly construing the "record" requirement of forfeiture statute on grounds that statute "should be construed liberally in favor of relieving from the drastic effects of the forfeiture acts those who act in good faith and without negligence" (quoting *One Ford Coach*)); *Jacobson v. $55,900 in U.S. Currency*, 728 N.W.2d 510, 521 (Minn. 2007) (construing state forfeiture statute in accordance with *One Ford Coach* principle so as to "strictly construe its language and resolve any doubt in favor of the party challenging it").

following section, it has an obvious and important application to the instant case.

II. The Decision Below Turns The *One Ford Coach* Principle Upside-Down.

The decision below flouts the *One Ford Coach* principle by straining to construe § 922(g) to effect a *de facto* forfeiture of Mr. Henderson's ownership interest in his firearm collection – notwithstanding the availability of reasonable, alternate statutory interpretations that would avoid forfeiture.

The decision below has worked the "functional equivalent of forfeiture," *Miller*, 588 F.3d at 419, in regard to Mr. Henderson's ownership interest in his gun collection. "Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.'" *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (citing *United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945)); *see also id.* ("the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it we denominate ownership"); *Southview Assoc., Ltd. v. Bongartz*, 980 F.2d 84, 93 (2d Cir. 1992) (adopting *Loretto* formulation that a taking has occurred "when government action permanently destroys the three rights associated with the ownership of property: the power to possess, to use, and to dispose"). In holding that § 922(g) renders a court powerless to "grant[ ] Mr. Henderson actual or constructive possession of a

firearm," *United States v. Henderson*, 555 F. App'x 851, 853 (11th Cir. 2014), *and* that transfer of ownership of the property to a third party would necessarily require him to take "constructive possession" of it,[10] the court eliminated the last of the rights remaining in Henderson's "bundle of sticks," *United States v. Craft*, 535 U.S. 274, 278 (2002). Henceforth, he can neither possess, use, *nor* dispose of what had previously been his property.

The Eleventh Circuit's disposition would, perhaps, be defensible if the statutory provision in question were susceptible to no other reasonable reading than the one it adopted. But as decisions by three other Courts of Appeals, one State Supreme Court, and several lower courts have made clear, that is most emphatically not the case.

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[10] The court below provided virtually no discussion to explain or justify its conclusion that Mr. Henderson's request for a court-ordered transfer of the property to a third party would require giving him "constructive possession" of it, relying instead on its earlier decision in *United States v. Howell*, 425 F.3d 971 (11th Cir. 2005), which it viewed as controlling. In *Howell*, the court denied a convicted felon's Rule 41(g) motion asking the court either to return seized firearms to him or, in the alternative, to "place the firearms in the possession of a relative in trust or sell the firearms and distribute the proceeds to him." *Id.* at 977. Describing the latter request as "interesting," the court in *Howell* nonetheless agreed with the Eighth Circuit that because such action "suggests constructive possession," *id.* at 976-77 (quoting *United States v. Felici*, 208 F.3d 667, 670 (8th Cir. 2000)), and because "[a]ny firearm possession, actual or constructive, by a convicted felon is prohibited by law," *id.*, it could not grant the request.

For instance, in *United States v. Miller*, 588 F.3d 418, 419-20 (7th Cir. 2009), the court, relying on *Cooper v. City of Greenwood*, 904 F.2d 302 (5th Cir. 1990), held that § 922(g) does not prohibit a court from ordering the transfer of a convicted felon's ownership interest in firearms to a third party, because such transfers need not involve "possession" of the property, actual *or* constructive, by the transferor. In *Miller*, the government had sought forfeiture of firearms that had been seized at defendant's residence, but it had missed the statutory deadline for doing so. *Miller*, 588 F.3d at 418-19. Miller then asked the court to sell the weapons for his account, or alternatively to "deliver them to someone legally entitled to possess them." *Id.* at 419. The government asserted that because § 922(g)'s prohibition against "possession" included "constructive possession" of the firearms, it prohibited both of Miller's proposed courses of action. *Id.*

The court disagreed. While "surrender[ing] the firearms to someone willing to accept Miller's instructions about their disposition" would indeed amount to granting Miller constructive possession of the firearms, *id.*, the court observed that "there are other possibilities" including "having a trustee sell or hold the guns, or giving them to someone who can be relied on to treat them as his own." *Id.* at 419-20. Because the property had not been the subject of a true forfeiture proceeding, the Seventh Circuit held that Miller's property interest in the firearms "continues even though his possessory interest has been

curtailed," *id.* at 420; the government therefore "must offer Miller some lawful option" for disposal of that property interest. *Id.*[11]

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[11] *See also United States v. Zaleski*, 686 F.3d 90, 93 (2d Cir. 2012) (holding that "a convicted felon may arrange to benefit from the sale of otherwise lawful, unforfeited firearms by a third party *without* actually or constructively possessing them" and therefore may validly transfer his ownership interest in firearms through a Rule 41(g) motion) (emphasis added); *Cooper v. City of Greenwood*, 904 F.2d 302, 305-06 (5th Cir. 1990) (convicted felon retains a "constitutionally protected" non-possessory ownership interest in surrendered firearms; rejecting government's argument that § 922(g) renders forfeiture proceeding "an empty and needless formality" if government seeks to divest claimant of that non-possessory interest); *United States v. Approximately 627 Firearms*, 589 F. Supp. 2d 1129, 1139-40 (S.D. Iowa 2008) (holding that § 922(g) does not prohibit court from "ordering the sale of [claimant's] personal firearms and the distribution of the proceeds to him," because that "would not result in [claimant's] exercise of 'dominion' and/or 'control' over the property" but would instead simply "restore [him], as closely as possible under the circumstances, to the same position he would have been in had the Government not seized his personal firearms to begin with"); *United States v. Parsons*, 472 F. Supp. 2d 1169, 1175 (N.D. Iowa 2007) ("Because the government already had taken possession and control over the firearms, and in doing so has also already deprived defendant Parsons of nearly all vestiges of ownership, the court concludes that permitting defendant Parsons to now designate to whom his firearm collection should be given *does not rise to the level of constructive possession* but is, instead, permitting defendant Parsons to exercise only the merest indicia of ownership.") (emphasis added); *State v. Fadness*, 268 P.3d 17, 20, 29-30 (Mont. 2012) (court may, consistent with Section 922(g), transfer convicted felon's firearms to a third party or to have the State sell firearms for the benefit of their owner).

United States v. Brown, 754 F. Supp. 2d 311 (D.N.H. 2010), is also illustrative of the manner in which courts have given a reasonable reading of § 922(g)'s prohibition against "possession" of firearms *without* causing *de facto* forfeiture of the claimant's property. Brown, a defendant in a criminal tax-fraud and money-laundering case, had voluntarily surrendered firearms that he owned as a condition of his release on bail. *Id.* at 313. Subsequent to his conviction, he signed and delivered a document purporting to transfer the firearms to a third party, Bernhard Bastian.[12] When the government subsequently sought forfeiture of the weapons, Bastian opposed the action on the grounds that they had been lawfully transferred to him by Brown. The government countered that "a convicted felon cannot lawfully divest himself of mere legal title to firearms that he can no longer lawfully possess, without thereby 'constructively possessing' those firearms." *Id.* at 314-15.[13]

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[12] The document read, in relevant part:

> [I]n the event of my death or incarceration or in any circumstances which prohibit my repossessing my property (guns, ammunition, firearms or any other items held at Riley's Sport Shop, Inc., at 1575 Hooksett Road, Hooksett, New Hampshire) all that property in its entirety is to be given to Bernhard Bastian, Weare, New Hampshire.

Brown, 754 F. Supp. 2d at 313.

[13] As the court summarized the government's view:

> [B]ecause Brown became a convicted felon upon return of the jury's guilty verdicts . . . he could not then,

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In the court's view, this amounted to declaring that "[a] person who lawfully owns, say, a valuable gun collection just before a jury returns an unrelated felony guilty verdict (*e.g.*, for mail fraud) *can, thereafter, no longer sell, give away, or transfer legal title to that collection*." *Id.* at 315 (emphasis added). Such a rule would "stretch the concept of 'constructive possession,' as the term is used in [§ 922(g)], much too far essentially equating criminal constructive possession with even the most minimal exercise of an indicia of ownership – transferring legal title." *Id.* Neither the language of the statute, nor the cases relied upon by the government, required such a construction:

> [S]trictly speaking, the decisions relied upon by the government are not so clear – they do generally accept that a defendant in such a predicament cannot *unilaterally* direct or "dictate" the specific disposition of owned

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> or at any time thereafter, actually or constructively possess the firearms . . (*i.e.*, he could not exercise "dominion or control" over them). Therefore, the government concludes, Brown also could no longer divest himself of legal title to the firearms, *because the minimal act of transferring title, even to property in the government's exclusive possession, necessarily requires the exercise of some "dominion or control,"* which, in turn, would constitute the crime of unlawful "possession," prohibited by [§ 922(g)]. . . [T]o the extent [Brown's] letter purports to transfer title [to Bastian], it is void.

Id. (emphasis added).

> firearms, but they do not, for example, hold that title to the firearms cannot be conveyed, or that a *court* cannot order an appropriate disposition of such firearms, for the benefit of the defendant.

Id. at 315. The court declined to adopt the government's interpretation, preferring instead a "pragmatic solution" according to which "the court, exercising equitable powers, may order the transfer of title for the felon-owner's benefit." *Id.* at 317 (citing *United States v. Approximately 627 Firearms*, 589 F. Supp. 2d 1129, 1140 (S.D. Iowa 2008)). The court explained that this approach "avoids serious constitutional issues" and "fully protects the felon-owner's legitimate property interests." *Id.*

As *Miller, Brown,* and the other cases cited in note 11 make clear, the *One Ford Coach* interpretive canon – "When either of two constructions can be given to a statute, and one of them involves a forfeiture, the other is to be preferred" – is not simply empty phraseology; it directs courts to look for "pragmatic solutions" to statutory construction problems that avoid imposing forfeiture or forfeiture-like remedies where Congress has not expressly provided for them. In the instant case, the Eleventh Circuit got it completely backwards, straining to find the one construction of the statutory language that, as applied to Mr. Henderson, would result in an absolute forfeiture of his property interest. As these cases demonstrate, it need not have done so; and because it need not

have done so, under *One Ford Coach* it *should not* have done so.

III. The Court Should Seize this Opportunity to Reaffirm and Reinvigorate the *One Ford Coach* Principle.

This case provides an important opportunity for this Court to reaffirm and reinvigorate the principle articulated in *One Ford Coach*.

More than 20 years ago, the Second Circuit Court of Appeals complained that "[d]espite [*One Ford Coach*'s] fifty-odd-year-old command, forfeitures are becoming more frequent in number and more summary in nature." *Onwubiko v. United States*, 969 F.2d 1392, 1400 (2d Cir. 1992); *see also United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896, 905 (2d Cir. 1992) ("We continue to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes."). In the ensuing two decades, the problem has grown substantially more acute, and what was already troubling to observers in the early 1990s has become a serious and alarming national epidemic.

Forfeitures have been increasing at a rapid rate for decades, and now occur on a vast and unprecedented scale. In the years since the passage of the

Comprehensive Crime Control Act of 1984,[14] the value of funds deposited annually into the Department of Justice's Asset Forfeiture Fund has soared 20-fold, from $93.7 million in 1986 to $406.8 million in 2001 to $2.08 *billion* in 2013, and the total value of assets held by the Asset Forfeiture and Seized Asset Deposit Funds has correspondingly increased from $1.26 billion in 2001 to over $6.3 billion last year.[15] A recently-published Washington Post exposé of forfeiture practice reported on over 60,000 cash seizures made on U.S. highways since 2001 involving *no* formal charges lodged against property owners, which nonetheless yielded a total of $2.5 billion (of which over $1.7 billion was returned to state and local authorities under the federal "Equitable Sharing" program, *see supra* note 3).[16] A detailed study in two states (Massachusetts

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[14] *See* note 3, *supra*.

[15] *See* U.S. DEP'T OF JUSTICE, FY 2013 ASSET FORFEITURE FUND REPORTS, *supra* note 4; U.S. DEP'T OF JUSTICE, AFF AND SEIZED ASSET DEPOSIT FUND ANNUAL FINANCIAL STATEMENTS FISCAL YEAR 2013, at 29, available at http://www.justice.gov/oig/reports/2014/a1408.pdf; U.S. DEP'T OF JUSTICE, AFF AND SEIZED ASSET DEPOSIT FUND ANNUAL FINANCIAL STATEMENT FISCAL YEAR 2001, available at http://www.justice.gov/jmd/afp/01programaudit/auditreport72002.htm; *see also* Walberg, *supra* note 4; WILLIAMS, *supra* note 4, at 31; Sarah Stillman, *Taken: Under Civil Forfeiture, Americans Who Haven't Been Charged With Wrongdoing Can Be Stripped of Their Cash, Cars, and Even Homes*, New Yorker, Aug. 12, 2013, available at http://www.newyorker.com/magazine/2013/08/12/taken.

[16] Michael Sallah, Robert O'Harrow Jr. & Steven Rich, *Stop and Seize: Aggressive Police Take Hundreds of Millions of Dollars from Motorists Not Charged With Crimes*, Washington

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and California) revealed that between 2002 and 2010 "Equitable Sharing" revenue from the Asset Forfeiture Fund more than doubled in the former ($2.2 million to $4.9 million) and more than tripled in the latter ($31.0 million to $138.3 million).[17] Hundreds of state and local law enforcement agencies and departments (if not more) have become increasingly reliant on forfeited cash to meet their budgetary targets.[18] As Rep. Tim Walberg of Michigan wrote recently: "civil forfeiture is big business for the government."[19]

Post, Sept. 6, 2014, available at http://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/. *See also* Stillman, *supra* note 15 (describing the "staggering" revenue gains from recent forfeiture activity).

[17] DICK M. CARPENTER II, LARRY SALZMAN & LISA KNEPPER, INEQUITABLE JUSTICE 11 & Table 4 (Inst. for Justice 2011), available at http://www.ij.org/images/pdf_folder/private_property/forfeiture/inequitable_justice-mass-forfeiture.pdf.

[18] The *Washington Post* study, Sallah, *supra* note 16, found that 298 departments and 210 local drug task forces have seized the equivalent of 20% or more of their annual budgets. Similarly, WILLIAMS et al., *supra* note 4, at 12-13, report based on a survey of several hundred law-enforcement agency heads that 40% of them viewed funds obtained via forfeiture as a "necessary budget supplement" and that a study of 52 randomly-chosen law-enforcement agencies in Texas found that civil forfeiture proceeds represent approximately 14% on average of their total budgets.

[19] Walberg, *supra* note 4; *see also* Rand Paul, *The Government Can Seize Your Property in Violation of the 5th Amendment*, Breitbart, Oct. 28, 2014, at http://www.breitbart.com/Big-Government/2014/10/28/rand-paul-op-ed.

These developments have been met with a chorus of alarm and opprobrium in the legal academy, a "spate of negative press reports," and "growing outrage among civil rights advocates, libertarians and members of Congress who have raised serious questions about the fairness of the practice."[20] Scholarly examination of current forfeiture practice has been "overwhelmingly critical,"[21] with commentators arguing that "allowing law enforcement to retain the forfeited assets creates perverse incentives for enforcers to pursue the most valuable assets rather than the most dangerous criminals" and to "shift investigatory resources toward cases with forfeitable assets and away from cases that are less likely to be lucrative."[22] One prominent study concluded thus:

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[20] Shaila DeWan, *Police Use Department Wish List When Deciding Which Assets to Seize*, N.Y. Times, Nov. 9, 2014, available at http://www.nytimes.com/2014/11/10/us/police-use-department-wish-list-when-deciding-which-assets-to-seize.html.

[21] Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 Harv. L. Rev. 853, 869 (2014).

[22] *Id.*; *see also* Blumenson & Nilsen, *supra* note 3, at 112 (noting the "extensive and disturbing history" of civil forfeiture law that has "wrought a dramatic shift in police motivation, towards practices that seriously undermine rational law enforcement efforts"); Eric Moores, *Reforming the Civil Asset Forfeiture Reform Act*, 51 Ariz. L. Rev. 777, 779, 784, 786-90 (2009) (noting the "perverse incentives for law enforcement agencies" in current forfeiture law and practice, with "minimal" procedural safeguards and "virtually no oversight"); Nkechi Taifa, *Civil Forfeiture vs. Civil Liberties*, 39 N.Y.L. Sch. L. Rev. 95, 95-96 (1994) (arguing that current civil forfeiture law "violates many of the fundamental tenets upon which this society was founded"

(Continued on following page)

> [M]any police agencies choose the law enforcement strategies that will take maximum advantage of federal forfeiture laws, circumvent their own state forfeiture laws, and maximize property seizures – reducing fairness and crime control issues to an afterthought.
>
> *Police abuses and warped law enforcement policy are only half of this disturbing story.* [P]olice self-financing raises serious accountability concerns, and threatens to establish a sector of permanent, independent, and self-aggrandizing police forces.[23]

Treatment in the popular press has been, if anything, even more caustic. Major investigative reports focused on both the vast (and hitherto largely

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including the Fourth Amendment right to be free from unreasonable searches and seizures and the Fifth Amendment right not to be deprived of property without due process of law, and noting the "swarms of horror stories about [forfeiture] misuse").

Even some voices within the law enforcement community have sounded the alarm. *See, e.g.*, Mike Moore & Jim Hood, *The Challenge to States Posed by Federal Adoptive Forfeitures*, National Ass'n of Att'ys Gen. Civil Remedies in Drug Enforcement Report, June-July 1992, at 2 (observing that the "financial incentive to law enforcement agencies has created competition among local law enforcement agencies for forfeited resources," which "weakens statewide drug enforcement efforts" and leads "many law enforcement agencies [to] refuse to share information with other law enforcement agencies, thereby hampering overall law enforcement efforts").

[23] Blumenson & Nilsen, *supra* note 3, at 112 (emphasis added).

invisible) scope of forfeiture activity and the many abuses perpetrated within the forfeiture system have appeared in the *New York Times*,[24] the *Washington Post*,[25] the *New Yorker*,[26] the *Wall Street Journal*,[27] and other national and local news outlets.[28]

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[24] DeWan, *supra* note 20; *see also* Shaila DeWan, *Law Lets I.R.S. Seize Accounts on Suspicion, No Crime Required*, N.Y. Times, Oct. 25, 2014, available at http://www.nytimes.com/2014/10/26/us/law-lets-irs-seize-accounts-on-suspicion-no-crime-required.html.

[25] Sallah, *supra* note 16.

[26] Stillman, *supra* note 15.

[27] John Emshwiller, Gary Fields & Jennifer Levitz, *Motel Is Latest Stopover in Federal Forfeiture Battle*, Wall St. J., Oct. 18, 2011, available at http://www.wsj.com/articles/SB10001424052970204450804576623404141904000.

[28] Stories in Dallas, TX, for instance, have raised questions about use of forfeiture funds by the county's district attorney – including use of $47,500 in forfeiture proceeds to settle an accident in which the DA rear-ended another driver. Jennifer Emily, *Audit of Dallas County DA's Forfeiture Fund Provides Few Clear Answers*, Dallas Morning News, Nov. 7, 2014, available at http://www.dallasnews.com/news/metro/20141107-audit-of-da-forfeiture-fund-provides-few-clear-answers.ece. Reports also have noted use of forfeiture funds to pay for Hawaiian vacations for law enforcement staff and families, *see* Zeke McCormack, *Former District Attorney Sentenced in Kerrville*, San Antonio Express-News, May 22, 2010, available at http://www.mysanantonio.com/news/local_news/article/Former-District-Attorney-sentenced-in-Kerrville-793542.php, a Dodge Viper ostensibly for use in DARE drug-education programs, *see* John Burnett, *Sheriff Under Scrutiny over Drug Money Spending*, NPR, June 18, 2008, at http://www.npr.org/templates/story/story.php?storyId=91638378, and even a Zamboni ice resurfacing machine, *see* Laura Krantz, *Audit: Worcester DA's Office Bought Zamboni, Lawn Gear with*

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It is a propitious moment for the Court to reassert its concerns about forfeiture use and misuse, and to take a small but measured step to engage the judiciary in reining in overzealous prosecutors and police officers by reminding lower courts of their duty to find reasonable ways to avoid imposing this particular remedy unless specifically and expressly directed to do so by Congress. The United States has abundant forfeiture authority throughout the U.S. Code;[29] it hardly needs the courts' help in crafting additional forfeiture provisions in circumstances where Congress has not clearly directed them to do so.

Forfeited Drug Money, MetroWest Daily News, Feb. 15, 2013, available at http://www.metrowestdailynews.com/x1522323792/Audit-Worcester-DAs-office-bought-Zamboni-lawn-gear-with-forfeited-drug-money#ixzz2LH4vHjJv.

The *Orlando Sentinel* also won a Pulitzer Prize for a 1993 series on forfeiture practices in Volusia County, FL, raising "questions about tactics and about the ethics of allowing this freewheeling drug squad to beef up the sheriff's budget with selective traffic stops of people never charged with a crime" and revealing that in 199 of the 262 cases they examined no charges were ever filed (though in only four of the cases did the drivers ever receive their money back) and that nine of every 10 seizures involved members of minority groups. *See* Jeff Brazil & Steve Berry, *Tainted Cash or Easy Money?*, Orlando Sentinel, June 14, 1992, available at http://articles.orlandosentinel.com/1992-06-14/news/9206131060_1_seizures-kea-drug-squad.

[29] There are more than 400 federal forfeiture statutes. *See* U.S. DEP'T OF JUSTICE, SELECTED FEDERAL ASSET FORFEITURE STATUTES (2006), available at http://www.justice.gov/criminal/foia/docs/afstats06.pdf.

CONCLUSION

The instant case involves forfeiture only because the Eleventh Circuit chose to make it so, by reading the statutory language in the most expansive manner possible so as to extinguish Mr. Henderson's property rights in his gun collection. The decision below countermands the *One Ford Coach* canon, which directs courts to construe statutes so as to *avoid* forfeitures unless commanded by the "letter and spirit of the law" expressed in "unclouded language" that is "sufficiently plain to admit no reasonable doubt." 307 U.S. at 226, 233, 236. The *One Ford Coach* principle can serve as an important bulwark against the alarming and unprecedented expansion in the use of this "exceedingly drastic" remedy, *id.* at 236, across the country. This case provides the Court with a golden opportunity to reaffirm and reinvigorate this important principle, and we urge it to do so.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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No. 13-1487

IN THE
Supreme Court of the United States

TONY HENDERSON,
Petitioner,
v.
UNITED STATES,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Section 922(g) of Title 18 of the U.S. Code makes it unlawful for a person convicted of specified crimes "to ... *possess* ... any firearm" (emphasis added).

The question presented is whether a conviction under § 922(g) prevents a court under Rule 41(g) of the Federal Rules of Criminal Procedure or under general equity principles from ordering that the government (1) transfer noncontraband firearms to an unrelated third party to whom the defendant has sold all his property interests or (2) sell the firearms for the benefit of the defendant.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE DUE PROCESS CLAUSE AND 18 U.S.C. § 924(d) REQUIRE THAT A FIREARM BE SUBJECT TO FORFEITURE TO EXTINGUISH OWNERSHIP 4

II. THE STATUTORY HISTORY OF § 922(g) DOES NOT SUGGEST ANY INTENT TO ALLOW DEPRIVATION OF OWNERSHIP INTERESTS WITHOUT ANY PROCESS 9

III. SECTION 924(d) EXPLICITLY DISTINGUISHES BETWEEN AN "OWNER," A "POSSESSOR," AND A "DELEGATE" 13

IV. ABILITY TO TRANSFER POSSESSION TO A THIRD PARTY IS CONSISTENT WITH THE FACT THAT A DISABILITY MAY BE TEMPORARY 15

V. LIKE FORFEITURE, PERMANENT RETENTION OF FIREARMS MAY BE AN EXCESSIVE FINE UNDER THE EIGHTH AMENDMENT 17

CONCLUSION 19

TABLE OF AUTHORITIES

CASES **Page**

Beecham v. United States,
511 U.S. 368 (1994) 16

Brewer v. Commonwealth,
206 S.W.3d 343 (Ky. 2006) 5

District of Columbia v. Heller,
554 U.S. 570 (2008) 5

King v. United States,
364 F.2d 235 (5th Cir. 1966) 10

King v. United States,
292 F. Supp. 767 (D. Colo. 1968) 10

National Rifle Ass'n v. Brady,
914 F.2d 475 (4th Cir. 1990) 12

State v. Spiers,
119 Wash. App. 85, 79 P.3d 30 (2003) 5

Tot v. United States,
319 U.S. 463 (1943) 9

United States v. Approximately 627 Firearms,
589 F. Supp. 2d 1129 (S.D. Iowa 2008) 7

United States v. Bajakajian,
524 U.S. 321 (1998) 17

United States v. Ferro,
681 F.3d 1105 (9th Cir. 2012) 7, 17, 18

United States v. Henderson,
555 Fed. Appx. 851 (11th Cir. 2014).....5, 19

United States v. One 1936 Model Ford V-8 De Luxe Coach,
307 U.S. 219 (1939) 8

United States v. One 6.5 mm. Mannlicher-Carcano Military Rifle,
250 F. Supp. 410 (N.D. Tex. 1966).....10

United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984).....14

United States v. Seven Miscellaneous Firearms, 503 F. Supp. 565 (D. D.C. 1980).....8

United States v. Stevens,
No. 08–cr–231, 2009 WL 6525926
(D. D.C. April 7, 2009).....15

CONSTITUTION

U.S. CONST., AMEND. II 5, 12

U.S. CONST., AMEND. IV 12

U.S. CONST., AMEND. V..... 1, 4, 12

U.S. CONST., AMEND. VIII 4, 16, 17, 19

U.S. CONST., AMEND. IX 12

U.S. CONST., AMEND. X.....12

STATUTES

C. 2, 64 Stat. 3 (1950).....9

Civil Asset Forfeiture Reform
Act of 2000 (CAFRA), 18 U.S.C. § 983 .....7, 17, 18

Federal Firearms Act,
C. 850, 52 Stat. 1250 (1938).....3, 9, 10, 13

Firearms Owners' Protection Act, P.L. 99-308,
100 Stat. 449 (1986) 3, 11, 12, 13

Gun Control Act, P.L. 90-618, 82 Stat. 1213
(1968) 3, 10, 11, 13

Omnibus Crime Control and Safe Streets Act
P.L. 90-351, 82 Stat. 236 (1968) 11

P.L. 89-318, 79 Stat. 1185 (1965) 10

18 U.S.C. App. § 1202(a)(1) 11

18 U.S.C. § 921(a)(20) 16

18 U.S.C. § 921(a)(33)(B)(ii).....16

18 U.S.C. § 922(g).....*passim*

18 U.S.C. § 922(g)(8) 15

18 U.S.C. § 922(h) 11

18 U.S.C. § 924(d).....3, 4, 6, 11, 13, 18

18 U.S.C. § 924(d)(1) ..... *passim*

18 U.S.C. § 924(d)(2)(C) 6, 12

18 U.S.C. § 924(d)(3) 6

18 U.S.C. § 926(a)(3) 15

18 U.S.C. § 983(a)(1)(B)-(D),(3)(A).....7

18 U.S.C. § 983(g)(1) 17

18 U.S.C. § 983(g)(2)-(3).....17

26 U.S.C. § 5845(a).....7

LEGISLATIVE MATERIALS

Senate Report 98-583, 98th Cong.,
2d Sess., 25-26 (1984).....12, 14

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.[1]

NACDL was founded in 1958. It has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it representation in its House of Delegates.

NACDL is dedicated to advancing the proper, efficient, and just administration of justice, including the administration of federal criminal law. NACDL files numerous amicus curiae briefs each year in this Court and other courts, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. In particular, in furtherance of NACDL's mission to safeguard fundamental constitutional rights, the Association frequently appears as amicus curiae in cases involving the Fifth Amendment and its state analogues,

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[1] No counsel for a party authored this brief in whole or in part and no person other than the amicus, its members, or its counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of the brief.

speaking to the importance of ensuring that no person is deprived of life, liberty, or property without due process of law. As relates to the issues before the Court in this case, NACDL has an interest in protecting the right of persons convicted of crimes to assign their ownership rights to non-contraband property that they may no longer lawfully possess to third parties or to reap the proceeds of a judicial sale of the property.

SUMMARY OF ARGUMENT

Section 922(g) of Title 18 of the U.S. Code makes it unlawful for a person convicted of specified crimes "to ... *possess* ... any firearm" (emphasis added). According to the court below, a person with a disabling conviction who *owns* a firearm, but does not possess it—because it is under the government's exclusive control and dominion—cannot arrange for its transfer to a third-party or otherwise benefit from a government-forced sale, because such acts would require *constructive* possession of the firearm, and hence violate § 922(g). As a result of that construction of § 922(g), the owner is completely divested of his property interests in the firearm, without any of the constitutional and statutory due process protections that would be afforded in a forfeiture proceeding or other type of government property seizure.

That result cannot be reconciled with the Due Process Clause or with the language, structure, and function of § 924(d)(1), a provision closely related to § 922(g) that governs the forfeiture of firearms actually *used* in the commission of certain offenses—unlike the firearms at issue here. Section 924(d)(1) explicitly distinguishes between *ownership* and *possession*, confirming petitioner's argument that under

§ 922(g), ownership is not equivalent to possession. Section 924(d)(1) also distinguishes between an "owner or possessor" and a "delegate," allowing the release of a firearm to a delegate if return to the owner would violate § 922(g). This provision further confirms that a person may have ownership interests in a firearm but no possessory interests, either actual or constructive.

More generally, § 924(d) ensures that property interests in firearms allegedly used in specified offenses can only be forfeited through an actual forfeiture proceeding, with all the special protections those proceedings entail. As construed by the Eleventh Circuit, however, § 922(g) effectively authorizes the government to permanently forfeit a firearm-owner's property interest in firearms *not* used in any offense, without any of the procedural protections of an actual forfeiture proceeding. That is, if petitioner here had actually violated § 922(g) by possessing a firearm, his property interest in the forearm could not be extinguished without a forfeiture proceeding. But petitioner has never violated § 922(g), and yet the Eleventh Circuit holds that his property interest *can* be extinguished without a forfeiture proceeding. That result is as wrong as it sounds.

The result is wrong for other reasons as well, starting with the history of the statute. The prohibition on receipt and possession of firearms by persons with disabling convictions and the basis and procedures for forfeiture of firearms may be traced from the Federal Firearms Act of 1938, to the Gun Control Act of 1968, and then to the Firearms Owners' Protection Act of 1986. Nothing in this statutory development suggests any Congressional intent to allow

deprivation of firearms without any process. Instead, this statutory history shows that Congress designed and redesigned forfeiture law governing firearms carefully to allow forfeiture in some instances but to preclude it in others.

The fact that a person's legal disability from possession may be temporary is also inconsistent with a rule extinguishing the person's ownership rights and allowing the government to retain the firearm permanently.

Finally, like a formal forfeiture, permanent retention of a firearm by the government may be an excessive fine under the Eighth Amendment. Review for excessiveness may be applied not only to an owner who did not use the firearm in any offense, but also to a person such as a spouse to whom the owner may have transferred rights.

ARGUMENT

I. THE DUE PROCESS CLAUSE AND § 924(d) REQUIRE THAT A FIREARM BE SUBJECT TO FORFEITURE TO EXTINGUISH OWNERSHIP INTERESTS

"No person shall be deprived of life, liberty, or property, without due process of law " U.S. Const., Amend. 5. To deprive a person of ownership interests in property that is not contraband, forfeiture laws are fashioned to specify the grounds upon which a person may (or may not) be deprived of the property and the procedures for doing so, which include notice and an opportunity to be heard.

This case involves property in the form of firearms lawfully owned by petitioner but in the exclusive possession and control of the government. Peti-

tioner wants to extinguish his ownership rights by transferring them to a third party, or by accepting the proceeds of a sale by the government. The court below held that in order for petitioner to assign his ownership rights or to receive the proceeds of their sale, petitioner would have to be deemed in "constructive possession" of the firearms and therefore would be in violation of § 922(g). *United States v. Henderson*, 555 Fed. Appx. 851 (11th Cir. 2014).

Firearms are recognized as lawful property under federal law, and individuals have a constitutionally protected right to "keep and bear arms." U.S. Const., Amend. 2; *see District of Columbia v. Heller*, 554 U.S. 570 (2008).[2] Section 922(g) makes it unlawful for a person convicted of specified offense to "possess" a firearm, 18 U.S.C. § 922(g), but § 924(d)(1) requires the government to use standard forfeiture proceedings to divest those persons of their firearm property: "Any firearm ... involved in or used in any knowing violation of [§ 922(g)] ... shall be subject to seizure and forfeiture." 18 U.S.C. § 924(d)(1). It follows that a firearm *not* involved or used in a viola-

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[2] *See Brewer v. Commonwealth*, 206 S.W.3d 343, 347 (Ky. 2006) ("the Commonwealth's argument in favor of automatic forfeiture [of firearms] cannot be correct, especially in light of the fact that citizens have a constitutional right to bear arms and a right to due process of law"); *State v. Spiers*, 119 Wash. App. 85, 93, 79 P.3d 30 (2003) (a law making it a crime for a person free on bond and charged with a serious offense to "retain[] ownership of a firearm, even if he relinquishes possession and control of the firearm" held violative of the right to bear arms).

tion of § 922(g) (or any other specified offense) is not subject to forfeiture under this provision.[3]

Petitioner lawfully owned (and owns) the firearms at issue, but relinquished their possession to the government, and was later convicted of a crime disabling him of possession under § 922(g). His firearms thus were never "involved in or used in" a violation of § 922(g), and thus are not subject to forfeiture under § 924(d)(1). For the government nevertheless to keep them for itself—not permitting him to sell them, or even to benefit from their sale—unambiguously deprives petitioner of his property without due process of law.

Notably, a firearm that *is* alleged to have been involved in or used in a knowing violation of § 922(g) is not subject to seizure and forfeiture unless the government initiates and successfully litigates a forfeiture action according to the procedures of § 924(d). Among other procedures, § 924(d)(1) requires that "[a]ny action or proceeding for the forfeiture of firearms ... shall be commenced within one hundred and twenty days of such seizure." § 924(d)(1). Section 924(d)(2) authorizes an award of attorneys' fees to a person who successfully recovers a firearm seized by the government pursuant to § 922(g). Section 924(d)(2)(C) further provides:

> Only those firearms ... particularly named and individually identified as involved in or used in any violation of the provisions of this chapter or any rule or regulation issued thereun-

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[3] A firearm "intended to be used in any offense referred to" in § 924(d)(3) is also subject to forfeiture (see § 924(d)(1)), but § 922(g) is not referred to therein.

> der, or any other criminal law of the United States ... shall be subject to seizure, forfeiture, and disposition.

Thus, a forfeiture action that was not timely filed could not be maintained. Firearms not "particularly named and individually identified as involved in or used in" violations would not be subject to forfeiture.[4] Moreover, "all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms" as defined in 26 U.S.C. § 5845(a) apply "so far as applicable." § 924(d)(1).

Further procedural requirements are set forth in the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), 18 U.S.C. § 983, which also applies to firearm forfeitures. *United States v. Ferro*, 681 F.3d 1105, 1109 (9th Cir. 2012). One such requirement is a 60-day limit from seizure to file an administrative forfeiture, and a 90-day limit thereafter to file the complaint. § 983(a)(1)(B)-(D),(3)(A).[5]

In addition to the explicit statutory requirements governing forfeiture of firearms and other property, there is a general rule that "[f]orfeitures are not fa-

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[4] "The Government bears the burden to establish that each of the ... firearms at issue were 'involved in' [defendant's] offense." *United States v. Approximately 627 Firearms*, 589 F. Supp. 2d 1129, 1135 (S.D. Iowa 2008) (finding that it failed to do so).

[5] Provisions of the Supplemental Rules for Admiralty or Maritime Claims & Asset Forfeiture Actions also apply to firearm forfeitures. *See, e.g.*, Rule G(2)(f) (complaint must "state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial").

vored" and "should be enforced only when within both the letter and the spirit of the law." *United States v. One 1936 Model Ford V-8 De Luxe Coach*, 307 U.S. 219, 226 (1939).

> Generally, forfeiture statutes are strictly construed against forfeiture and in favor of the person whose property rights are affected. Every element justifying the forfeiture must be clearly shown and the rules of procedure are to be construed so as to narrowly circumscribe the remedy of forfeiture.

United States v. Seven Miscellaneous Firearms, 503 F. Supp. 565, 579 (D. D.C. 1980). The government could not simply keep a firearm based on its knowledge or belief that its owner possessed it after having been convicted of a crime punishable by imprisonment for a term exceeding one year. The owner could not be deprived of the property without due process of law as specified in the forfeiture requirements.

Yet that is precisely what happened to petitioner here. Even though a person with a disabling conviction who possesses a firearm in violation of § 922(g) could not be deprived of his property rights in the firearm without the protections of a forfeiture proceeding, petitioner—who did *not* possess a firearm in violation of § 922(g)—*is* being deprived of his property rights with no process whatsoever.

II. THE STATUTORY HISTORY OF § 922(g) DOES NOT SUGGEST ANY INTENT TO ALLOW DEPRIVATION OF OWNERSHIP INTERESTS WITHOUT ANY PROCESS

The history of the federal prohibition on firearm possession by persons with disabling convictions and of the associated forfeiture laws confirms that Congress never intended that persons be deprived of their ownership interests without due process. To the contrary, the statutory history reveals the care with which Congress has developed the conditions under which a person may or may not be deprived of firearm ownership.

The Federal Firearms Act of 1938 (FFA) made it "unlawful for any person who has been convicted of a crime of violence or is a fugitive from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." C. 850, 52 Stat. 1250, 1251 (1938).[6] The FFA did not include a forfeiture provision, but one was added in 1950: "Any firearm or ammunition involved in any violation of the provisions of this Act or any rules or regulations promulgated thereunder shall be subject to seizure and forfeiture ...." C. 2, 64 Stat. 3 (1950). The predicate for forfeiture was that a firearm had to be "involved in" such violation.

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[6] This Court declared as violative of due process the Act's burden-shifting provision that "the possession of a firearm or ammunition by any such person shall be presumptive evidence" of such receipt, shipment, and transport. *Tot v. United States*, 319 U.S. 463 (1943)

A dramatic test of this provision arose regarding whether the government could retain possession and obtain title to the rifle used by Lee Harvey Oswald to assassinate President Kennedy, which was thereafter sold by Marina Oswald to a third party. *See United States v. One 6.5 mm. Mannlicher-Carcano Military Rifle*, 250 F. Supp. 410, 411 (N.D. Tex. 1966). The issue was "whether the government may obtain such title by forfeiture, without compensation to the owner, or must resort to condemnation by the exercise of eminent domain, in which event the owners must be compensated." *King v. United States*, 364 F.2d 235 (5th Cir. 1966).

Oswald's rifle was held to be outside the bounds of forfeiture under the FFA. As the court explained, the FFA imposed two requirements for forfeiture: a violation of the FFA itself, and the firearm "be 'involved in' the violation." *Id.* at 236. While Oswald had lied about his identity when he ordered the rifle from a licensed dealer, that was not an offense under the FFA, which was not otherwise violated. "Since no violation of the Act was proved, the weapons are not subject to forfeiture." *Id.* at 241.

In response, Congress enacted a statute providing for the acquisition of "all right, title, and interest" in evidence pertaining to the assassination and provided a cause of action for owners of the items to obtain just compensation. P.L. 89-318, 79 Stat. 1185 (1965). The claimant to the rifle pursued this remedy. *King v. United States*, 292 F. Supp. 767 (D. Colo. 1968). In short, in the case involving the worst possible facts of firearm usage and ownership, the law ensured that the purported owner's property rights

were extinguished only through the provision of due process and just compensation.

The Gun Control Act of 1968 (GCA) expanded the coverage of the FFA. The GCA made it "unlawful for any person – (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." P.L. 90–618, 82 Stat. 1213, 1220-21 (1968) (enacting 18 U.S.C. § 922(h)). The GCA further expanded the scope of the forfeiture provision as follows: "Any firearm or ammunition involved in or used or intended to be used in, any violation of the provisions of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, shall be subject to seizure and forfeiture ...." *Id.* at 1224 (enacting 18 U.S.C. § 924(d)).

Separately, Title VII of the Omnibus Crime Control and Safe Streets Act ("OCCSSA") imposed punishment on "[a]ny person who – (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony ... and who receives, possesses, or transports in commerce or affecting commerce ... any firearm." P.L. 90-351, 82 Stat. 236 (1968), enacting 18 U.S.C. App. § 1202(a)(1).

The Firearms Owners' Protection Act (FOPA), P.L. 99-308, 100 Stat. 449, 452 (1986), consolidated the GCA and OCCSSA prohibitions into the current provision codified at § 922(g). But FOPA also repealed the GCA's broad forfeiture power and, among other revisions, substituted the particularity re-

quirement in current § 924(d)(2)(C). 100 Stat. at 457-58. According to the relevant Senate Report, "only those firearms particularly and individually identified as used, involved in or, in certain cases, intended to be used in a violation of Chapter 44, regulations issued thereunder, or any other Federal criminal law, may be seized or forfeited." Senate Report 98-583, 98th Cong., 2d Sess., 25-26 (1984).[7] The limitation was intended "to prevent wholesale forfeiture of collections or inventories upon a claim of general intent to use them illegally." *Id.*

Indeed, as its title reflects, FOPA as a whole was intended to broadly protect the constitutional rights of firearm owners, including, *inter alia*, Second, Fourth, and Fifth Amendment rights. In findings set forth in the text of the statute itself, FOPA declares:

> The Congress finds that –
>
> (1) the rights of citizens –
>
> (A) to keep and bear arms under the second amendment to the United States Constitution;
>
> (B) to security against illegal and unreasonable searches and seizures under the fourth amendment;
>
> (C) against uncompensated taking of property, double jeopardy, and assur-

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[7] "There was no Senate Report on Pub.L. No. 99-308. S.Rep. No. 98-583 accompanied S. 914, the substantially similar predecessor to S. 49, the Senate bill which was the basis for Pub.L. No. 99-308." *National Rifle Ass'n v. Brady*, 914 F.2d 475, 477 n.1 (4th Cir. 1990).

> ance of due process of law under the fifth amendment; and
>
> (D) against unconstitutional exercise of of authority under the ninth and tenth amendments; require additional legislation to correct existing firearms statutes and enforcement policies ....

§1(b), 100 Stat. 449.

In sum, the FFA began with a narrow conception of who could be disabled from firearm possession, which was substantially expanded by the GCA and OCCSSA and consolidated by FOPA. The FFA's 1950 amendment adding a modest forfeiture provision was also greatly expanded in the GCA, but the latter was significantly narrowed by FOPA. The specificity with which Congress designed and redesigned the forfeiture law governing firearms undermines any inference that Congress envisioned or intended any circumstance in which the government could extinguish a person's entire property interests in a firearm absent a proper forfeiture action.

III. SECTION 924(d) EXPLICITLY DISTINGUISHES BETWEEN AN "OWNER," A "POSSESSOR," AND A "DELEGATE"

Section 924(d)(1) provides that "upon acquittal of the owner or possessor" (or in certain other circumstances) a seized firearm "shall be returned forthwith to the owner or possessor or to a person delegated by the owner or possessor unless the return of the firearms or ammunition would place the owner

or possessor or his delegate in violation of law."[8] That language expressly distinguishes between an "owner or possessor" (meaning the possessor at the time of the seizure), a clear recognition that "ownership" is not equivalent to "possession." The express statutory distinction in § 924(d)(1) precludes any conclusion that by using only the term "possesses" in § 922(g)—a closely related provision of the same statute—Congress *also* meant to refer to *ownership* rights, such that the exercise of a non-possessory ownership right by assigning the property or reaping its proceeds would create a form of "possession" that would violate § 922(g).

Section 924(g) also distinguishes both the "owner or possessor" from "a person delegated by the owner or possessor." Section 924(d)(1) thus allows a firearm to be returned to the owner's delegate if returning it to the owner himself (thereby giving him possession) would place the owner in violation of § 922(g)'s prohibition on possession. That structure confirms that a person who may not lawfully possess a firearm does not commit an act of possession by assigning his or her ownership interest in a firearm to a delegate.

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[8] The Court held in *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984), that "a gun owner's acquittal on criminal charges involving firearms does not preclude a subsequent in rem forfeiture proceeding against those firearms under § 924(d)." *Id.* at 366. The FOPA amendment was "intended to reverse" the result in *89 Firearms*. Senate Rep. No. 98-583, *supra*, at 25 n.56.

IV. ABILITY TO TRANSFER POSSESSION TO A THIRD PARTY IS CONSISTENT WITH THE FACT THAT A DISABILITY MAY BE TEMPORARY

The fact that legal disabilities from gun possession can be temporary is also inconsistent with the Eleventh Circuit's theory that a person with such a disability cannot lawfully transfer his ownership interests.

Under § 924(g)(8), for example, a person subject to a court order restraining him from certain activities involving an intimate partner may not lawfully possess a firearm. Section 926(a)(3) authorizes the Attorney General to adopt "regulations providing for effective receipt and secure storage of firearms relinquished by or seized from persons described in" § 922(g)(8). Upon "lapse of or court termination of the restraining order to which he is subject, the seized or relinquished firearms ... shall be returned forthwith to the owner or possessor" or delegate thereof. § 924(d)(1).

Under this provision, the government may take possession of and store a firearm for a person under a legal disability, but the owner is also free to transfer the firearm to a third party—the point is to prohibit the person's *own possession*. The person does not lose ownership rights as a result of the disability; rather, the law mandates that the firearm be returned to the owner if the disability is removed.

By the same token, even under § 922(g), a conviction for a crime punishable by imprisonment for more than one year may be overturned, at which

point he is entitled to recover his firearms. For instance, Senator Ted Stevens was convicted of a crime punishable by imprisonment for more than one year, but that conviction did not extinguish his ownership interests in any firearms that he may have had. His conviction was set aside, *see United States v. Stevens*, No. 08–cr–231, 2009 WL 6525926 (D. D.C. April 7, 2009), and at that point he could have regained possession of his firearms. The same result could obtain in a successful appeal of a disabling conviction, or in a habeas challenge mandating vacatur of a state-court conviction. Section 921(a)(20) addresses such situations expressly:

> Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

See also 18 U.S.C. § 921(a)(33)(B)(ii) (similar for person convicted of misdemeanor crime of domestic violence). As this Court has explained, the foregoing provision "does not simply say that a person whose civil rights have been restored is exempted from § 922(g)'s firearms disqualification. It says that the person's conviction 'shall not be considered a conviction.'" *Beecham v. United States*, 511 U.S. 368, 372 (1994).

The same could be said about all of the above scenarios, each of which demonstrates that a disabling conviction may not be permanent. It would be a gross violation of due process to extinguish a per-

son's property interests in a firearm the moment the disabling conviction occurs, leaving him with nothing if and when the conviction is erased.

V. LIKE FORFEITURE, PERMANENT RETENTION OF FIREARMS MAY BE AN EXCESSIVE FINE UNDER THE EIGHTH AMENDMENT

Forfeitures are subject to the Eighth Amendment's guarantee that "excessive fines [may not be] imposed." *United States v. Bajakajian*, 524 U.S. 321 (1998). CAFRA provides that a claimant "may petition the court to determine whether the forfeiture was constitutionally excessive." 18 U.S.C. § 983(g)(1). The court must weigh the "gravity of the offense" and whether the forfeiture is "grossly disproportional" to the offense. 18 U.S.C. § 983(g)(2)-(3).

The permanent retention by the government of a firearm without any process is equally subject to the Eighth Amendment's prohibition on excessive fines. The retention may not be formally labeled a "fine," the only difference is that the government takes not money, but a firearm.

In *United States v. Ferro*, 681 F.3d 1105 (9th Cir. 2012), the Ninth Circuit applied the Eighth Amendment and CAFRA to "the largest civil *in rem* forfeiture proceeding against firearms unlawfully possessed by a convicted felon in American history," involving "hundreds of collectable guns valued at $2.55 million." *Id.* at 1106. Many of the guns were so rare that the government wanted to place them in the ATF museum. "Some of the firearms are gold-plated; others are early twentieth-century rarities; several are valued at $10,000 or more." *Id.* at 1108.

Although he had assigned his ownership interest in the collection to his wife before his disabling conviction, the husband had access to the firearms at the family home, and thus possessed them in violation of § 922(g). *Id.* at 1107. The court held that the wife was not an innocent owner, since she knew of her husband's conviction, even if she did not know the legal ramifications. *Id.* at 1113.

While those facts made the entire collection subject to forfeiture under § 924(d)(1), the *Ferro* court held that "forfeitable property is subject to review under the Excessive Fines Clause even if it can be considered an 'instrumentality' of an offense." *Id.* at 1114. "After CAFRA," the court observed, "we think it clear that all types of civil forfeitures—save perhaps forfeitures of contraband, such as unregistered hand grenades or illegal drugs—are subject to review for excessiveness." *Id.* The firearms were an instrumentality of the offense of possession of a firearm by a felon, but the person being punished by the forfeiture was the wife-owner, not the husband-felon. "Because we conclude that the Constitution requires consideration of the culpability of the property's owner, a district court must undertake that analysis, even if it is not required to do so under the statute." *Id.* at 1117. That "excessiveness review must consider the individualized culpability of the property's owner and, when analyzing the offending conduct, it must focus only on the conduct that actually gave rise to the forfeiture of the property at issue, not other criminal conduct by the same person." *Id.* at 1107.

The facts here are in sharp contrast with *Ferro*. Petitioner duly surrendered his firearms to the gov-

ernment for storage before his conviction. After his conviction, he never possessed his firearms, which were thereby not instrumentalities of crime subject to forfeiture under § 924(d). He sought to transfer his ownership of the firearms to a buyer or to his wife, but the court refused to allow them to take possession. *Henderson*, 555 Fed. Appx. at 853. Under these facts, the government's extra-legal expropriation of the firearms constitutes an excessive fine under the Eighth Amendment.

CONCLUSION

For the foregoing reasons, and for the reasons stated by petitioner, the judgment should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In The
Supreme Court of the United States

TONY HENDERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF AMICUS CURIAE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC. IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

"The general rule is that seized property, other than contraband, should be returned to its rightful owner once * * * criminal proceedings have terminated." *Cooper v. City of Greenwood*, 904 F.2d 302, 304 (5th Cir. 1990) (quoting *United States v. Farrell*, 606 F.2d 1341, 1343 (D.C. Cir. 1979) (quoting *United States v. La Fatch,* 565 F.2d 81, 83 (6th Cir. 1977)). 18 U.S.C. § 922(g) makes it "unlawful for any person * * * who has been convicted in any court of [ ] a crime punishable by imprisonment for a term exceeding one year * * * to * * * possess * * * any firearm."

The question presented is whether such a conviction prevents a court under Rule 41(g) of the Federal Rules of Criminal Procedure or under general equity principles from ordering that the government (1) transfer non-contraband firearms to an unrelated third party to whom the defendant has sold all his property interests or (2) sell the firearms for the benefit of the defendant. The Second, Fifth, and Seventh Circuits and the Montana Supreme Court all allow lower courts to order such transfers or sales; the Third, Sixth, Eighth and Eleventh Circuits, by contrast, bar them.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 6

I. Applying constructive possession to prohibit a bona fide transfer of non-contraband firearms creates an extension of Section 922(g)(1)'s prohibition to law-abiding citizens in violation of the Second Amendment and the intent of the law 6

II. The case law is clear that a non-prohibited person acquainted or sharing a residence with a prohibited person does not affirmatively participate in the prohibited person's unlawful possession of a firearm by possessing a firearm themselves 10

III. Requiring assurances from lawful firearms owners that they will not aid a prohibited person in violating the law cannot be a constructive discretionary licensing system 14

TABLE OF CONTENTS – Continued

Page

IV. The Government seeks to create a separate class of individuals entitled to diminished Second Amendment rights solely by virtue of their relationship to a prohibited person..... 18

CONCLUSION..... 20

TABLE OF AUTHORITIES

Page

CASES

Clark v. Jeter, 486 U.S. 456 (1988).....19

District of Columbia v. Heller, 554 U.S. 570 (2008).....*passim*

Drake v. Filko, 724 F.3d 426 (3d Cir. 2013).....17

Foucha v. Louisiana, 504 U.S. 71 (1992).....19

Kachalsky v. Cnty. of Westchester, 701 F.3d 81 (2d Cir. 2012).....17

Lawrence v. Texas, 539 U.S. 558 (2003).....19

Lewis v. United States, 445 U.S. 55 (1980).....8

McDonald v. City of Chicago, 561 U.S. 742 (2010).....6, 18

Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).....19

Peruta v. County of San Diego, 742 F.3d 1144 (9th Cir. 2014).....17

Reno v. Flores, 507 U.S. 292 (1993).....19

Roberts v. United States Jaycees, 468 U.S. 609 (1984).....9

San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).....19

Scarborough v. United States, 431 U.S. 563 (1977).....8

Staub v. City of Baxley, 355 U.S. 313 (1958).....15, 16, 17

TABLE OF AUTHORITIES – Continued

Page

United States v. Cardenas, 864 F.2d 1528 (10th Cir. 1989) 11

United States v. Carolene Prods. Co., 304 U.S. 144 (1938) 19

United States v. Flenoid, 718 F.2d 867 (8th Cir. 1983) 11

United States v. Gomez, 92 F.3d 770 (9th Cir. 1996) 8

United States v. Griffin, 684 F.3d 691 (7th Cir. 2012) 10, 13, 14

United States v. Howell, 425 F.3d 971 (11th Cir. 2005) 2

United States v. Huet, 665 F.3d 588 (3d Cir. 2012) 5, 8

United States v. Thomas, 321 F.3d 627 (7th Cir. 2003) 10

Woollard v. Sheridan, 712 F.3d 865 (4th Cir. 2013) 17

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) 19

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. II ..... *passim*

STATUTES

18 U.S.C. § 922 ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

18 U.S.C. § 922(g) 3, 13, 17

18 U.S.C. § 922(g)(1) .....*passim*

RULES

Rule 37.2(b), U.S. Supreme Court 1

Rule 37.6, U.S. Supreme Court 1

FEDERAL REGULATIONS

Fed. R. Crim. P. 41(g) 2

OTHER AUTHORITIES

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INTEREST OF AMICUS CURIAE[1]

The National Rifle Association of America, Inc. ("NRA") is a nonprofit, voluntary membership corporation qualified as tax-exempt under 26 U.S.C. § 501(c)(4) with its headquarters in Fairfax, Virginia. Founded in 1871, the NRA is America's foremost and oldest civil rights organization and defender of Second Amendment rights. Its approximately five million members are individual Americans bound together by a common desire to ensure the preservation of the Second Amendment right to keep and bear arms. The first purpose and objective of the NRA, as outlined in NRA By-Laws art. II, § 1, is:

> [t]o protect and defend the Constitution of the United States, especially with reference to the inalienable right of the individual American citizen guaranteed by such Constitution to acquire, possess, collect, exhibit, transport, carry, transfer ownership of, and enjoy the right to use arms, in order that the people may always be in a position to exercise their legitimate individual rights of self-preservation and defense of family, person,

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae NRA states that no counsel for any party authored this brief in whole or in part, and that no entity or person, aside from Amicus Curiae, its members, and/or its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, counsel of record for all parties received timely notice of Amicus Curiae's intent to file and have consented to this filing in letters on file with the Clerk's office.

> and property, as well as to serve effectively in the appropriate militia for the common defense of this Republic and the individual liberty of its citizens.

The NRA has a particular interest in this case, as the courts below improperly expanded 18 U.S.C. § 922 so that it adversely affects law-abiding citizens in contravention of the Second Amendment. Furthermore, the current circuit split has created a climate of uncertainty regarding the lawful acquisition, possession and transfer of ownership of firearms.

SUMMARY OF THE ARGUMENT

On July 16, 2010, Petitioner Henderson filed a "Motion for the Return/Disposition of Property" requesting that the non-contraband firearms he voluntarily surrendered to the FBI be transferred from the possession of the FBI to an identified third-party purchaser or Henderson's wife. Relying on *United States v. Howell*, 425 F.3d 971 (11th Cir. 2005), the Magistrate judge recommended that the motion be denied because, even though the firearms were not seized, forfeited or contraband, Henderson had not initiated a transfer until after he was disqualified from possession.[2] Pet. App. 11a-14a.

[2] In its Brief in Opposition, the Government contends that a motion under Fed. R. Crim. P. 41(g) is a motion in equity. U.S.

(Continued on following page)

The District Court adopted the Magistrate Judge's report and recommendation, and the Court of Appeals affirmed. The Government now argues that Henderson's request for the transfer to a third-party purchaser or Henderson's wife, among other things, "would not even rule out the possibility that his wife or friend would subsequently allow him further control over [the firearms]" and that "[u]nder the circumstances, both of petitioner's proffered options created a significant risk that petitioner would retain custody or control over the firearms in violation of Section 922(g)." U.S. Br. in Opp'n. at 9.

Based upon its unsubstantiated speculation that Henderson might somehow retain control over the firearms he had sold to a third party, the Government seeks to distinguish the proposed transfer from other potential sales of firearms on behalf of convicted felons, such as a situation in which firearms are transferred "to a federally licensed gun dealer who

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Br. in Opp'n. at 9-10. In terms of equity, it is important to note that the Government seeks to apply Section 922(g) to bar the instant requested transfer even though: 1. the transfer could not have been barred if it had been conducted prior to Henderson's becoming a prohibited person; 2. the Government seeks to draw a spurious distinction between the instant transfer and a transfer to a FFL unrelated to Henderson; and 3. it is inarguable that, under the facts of this case, both the third-party purchaser and Henderson's wife could legally acquire and possess firearms other than those in the possession of the FBI. In short, the "constructive possession" argument advanced by the Government is wholly illusory, and equity would in fact counsel the relief requested by Henderson.

would sell them, comply with any procedures required by the court, and remit the proceeds to the defendant." *Id.* at 13. The Government's argument on this score thus has nothing to do with the character of the felon prohibited from possessing firearms, but rather focuses on the *non-felon, non-prohibited possessor's* relationship to that felon. The result is that the Second Amendment rights of certain law-abiding, responsible citizens – such as family members or friends of individuals who have been convicted of a felony – are accorded less weight than the Second Amendment rights of other law-abiding citizens, including those who do not propose to use the firearms in question for the purpose of self-defense in the home.

The Government's position adopted by the Court of Appeals effectively expands the scope of 18 U.S.C. § 922(g)(1) beyond its terms to reach wholly innocent conduct by law-abiding citizens. Section 922(g)(1) prohibits anyone "who has been convicted in any court of a crime, punishable by imprisonment for a term exceeding one year to possess any firearm[.]" It does not prohibit the family members or friends of such individuals from possessing firearms, nor could it without running afoul of the Second Amendment. Yet the Government argues that the transfer of firearms to an acquaintance or family member of a felon is inherently suspect without any demonstration that the felon has any power or intention to exercise dominion or control over the firearm. The courts below erred in accepting this position and

misapply the concept of constructive possession to bar the proposed transfer.

Broadening the scope of Section 922(g)(1), by effectively expanding the class to whom it applies to include non-felons, punishes a non-felon as a principal under a statute which, by its express terms, is applicable only to felons. Especially where, as here, the non-felon's allegedly culpable activity is the core protected conduct of possessing a firearm in the home, this is an improper, and unsustainable, interpretation of Section 922(g)(1). The Government's position thus runs roughshod over the admonition that courts must be "mindful of the risk that felon dispossession statutes may be misused to subject law-abiding cohabitants to liability simply for possessing a weapon in the home," *United States v. Huet*, 665 F.3d 588, 601 (3d Cir. 2012), imposes an unconstitutional burden on the Second Amendment rights of law-abiding citizens, and creates a means for the Government to cause the constructive forfeiture of personal property not subject to the due process protections required by that process.

The logical extension of the constructive possession theory applied by the Court of Appeals is to disable not just friends and family members of a disqualified person, but also third-party purchasers for value, from exercising their fundamental rights. Even if Section 922(g)(1) extended that far, which it does not, the Second Amendment would bar such an extension.

ARGUMENT

I. Applying constructive possession to prohibit a bona fide transfer of non-contraband firearms creates an extension of Section 922(g)(1)'s prohibition to law-abiding citizens in violation of the Second Amendment and the intent of the law.

It has been six years since this Court concluded in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that the Second Amendment secures an individual right to keep and bear arms, and four years since the Court underscored that this individual right is fundamental in *McDonald v. City of Chicago*, 561 U.S. 742 (2010). While the vast majority of subsequent jurisprudence has focused on one aspect of those decisions – that individual self-defense is "the *central component*" of the Second Amendment right, *Heller*, 554 U.S. at 599 – the issue presented by this case calls for focus on both that issue and the additional core issue presented in *Heller*: the District of Columbia's unconstitutional prohibition on the possession of operable and immediately accessible firearms in the home.

The Government's present position, that a prohibited persons' transfer of non-contraband firearms to a lawful third party creates a heightened level or risk absent assurances of lawfulness not only belies *Heller*'s recognition of the fundamental right to keep and bear arms by non-prohibited persons, but it also attempts to extend impermissibly 18 U.S.C. § 922(g)(1) by implying guilt on the innocent.

This Court in *Heller* did not attempt to delve into the entire field of firearms law throughout this country. Focusing on the issues at hand in the case, the opinion noted that:

> [a]lthough we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of firearms.

Heller, 554 U.S. at 626-627.

Highlighting the longstanding prohibition on the possession of firearms by felons, *Heller* seemingly recognized the facial validity of the prohibition contained in 18 U.S.C. § 922(g)(1); however, the opinion also enshrined the fact that "the inherent right of self-defense has been central to the Second Amendment right" and nowhere is the right more acute than in the home, "where the need for defense of self, family, and property is more acute." *Id.* at 628. "In sum, we hold that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable *for the purpose of immediate self-defense.*" *Id.* at 635 (emphasis added).

Neither party to this case has challenged the validity of 18 U.S.C. § 922(g)(1)'s prohibition, and that issue falls outside the scope of this brief.[3] However, the Court should be "mindful of the risk that felon dispossession statutes may be misused to subject law-abiding cohabitants to liability simply for possessing a weapon in the home." *Huet*, 665 F.3d at 601.

As this Court noted following its review of "the legislative history in its entirety" behind the felon-in-possession prohibition, "Congress sought to rule broadly to keep guns out of the hands of those who have demonstrated that 'they may not be trusted to possess a firearm without becoming a threat to society.'" *Scarborough v. United States*, 431 U.S. 563, 572 (1977); *see also Lewis v. United States*, 445 U.S. 55, 66 (1980) ("The legislative history of the gun control laws discloses Congress' worry about the easy availability of firearms, especially to those persons who pose a threat to community peace"). Despite this

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[3] Even if Section 922(g)(1) were facially constitutional, it is possible that it could have unconstitutional applications. For example, finding that a felon convicted of possession of a firearm should have been permitted to present a justification defense, the Court in *United States v. Gomez*, 92 F.3d 770, 774 n.7 (9th Cir. 1996), notes that "18 U.S.C. § 922(g)(1) might not pass constitutional muster were it not subject to a justification defense" and that "the Second Amendment might trump a statute prohibiting the ownership and possession of weapons that would be perfectly constitutional under ordinary circumstances. Allowing for a meaningful justification defense ensures that 18 U.S.C. § 922(g)(1) does not collide with the Second Amendment."

broad purpose, however, nowhere is there any indication that the law was envisioned to infringe on the rights guaranteed by the Second Amendment by burdening the possession of firearms by friends and family members of convicted felons.

The premise now before the Court invokes the theory that the transfer of firearms to a non-prohibited third party by an individual prohibited under 18 U.S.C. § 922(g)(1) invokes constructive possession, which in turn creates "a significant risk" that the prohibited person "would retain custody or control over the firearms, in violation of Section 922(g)." U.S. Br. in Opp'n. at 9.

This premise, and the Government's argument, is in essence a plea for this Court to extend Section 922(g)(1)'s prohibition to non-felons without any nexus between the firearms and the prohibited individual's possession beyond mere association and/or presence in a shared residence – a position which infringes on lawful firearms owners' Second Amendment rights and other fundamental liberty interests and turns a blind eye to both existing precedent and the purpose behind the law. *See, e.g.*, *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984) ("The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State.").

II. The case law is clear that a non-prohibited person acquainted or sharing a residence with a prohibited person does not affirmatively participate in the prohibited person's unlawful possession of a firearm by possessing a firearm themselves.

The Government's position is a subterfuge under which it can limit or restrict a law-abiding citizen's Second Amendment rights for simply associating with a prohibited person under the theory of constructive possession without having to establish any of the elements required by Section 922(g)(1).

There exists substantial case law demonstrating unequivocally that a prohibited person may reside or be present in the home of a lawful firearms owner without exercising dominion or control over the firearms in violation of Section 922(g). *See United States v. Thomas*, 321 F.3d 627, 636 (7th Cir. 2003) ("[e]ven when a defendant continues to have weapons in his home that he legally obtained before his felony convictions, he is not guilty of violating 18 U.S.C. § 922(g)(1) without a showing that he exercised control over the firearms"); *United States v. Griffin*, 684 F.3d 691, 697 (7th Cir. 2012) ("when [a] defendant jointly occupies a residence, proof of constructive possession of contraband in the residence requires the government to demonstrate a 'substantial connection' between the defendant and the contraband itself, not just the residence[.]"); *id.* at 695 ("Constructive possession may be established by demonstrating that the defendant knowingly had both the power and the

intention to exercise dominion and control over the object, either directly or through others. This required 'nexus' must connect the defendant to the contraband, separating true possessors from mere bystanders.") (internal citations omitted); *see also United States v. Cardenas*, 864 F.2d 1528, 1533 (10th Cir. 1989) ("In addition to knowingly holding the ability to control an object, there must be an act by which that ability is manifested and implemented[.]"); *United States v. Flenoid*, 718 F.2d 867, 868 (8th Cir. 1983) (finding that mere physical proximity to the contraband is insufficient to establish constructive possession).

In addition, advisory opinions of the Bureau of Alcohol, Tobacco, Firearms and Explosives ("BATFE"), *see* 1 Stephen P. Halbrook, Firearms Law Deskbook, Federal and State Criminal Practice § 2:20 (2014-2015 ed.) (2014), contradict the Government's contention that mere possession of a firearm, let alone the return of the non-contraband firearms, creates a "significant risk that petitioner would retain custody or control over the firearms in violation of Section 922(g)." U.S. Br. in Opp'n. at 9.

> Federal law places no restrictions on the receipt or possession of firearms by the spouse or children of a prohibited person. However, those individuals' rights to possess firearms may not be used as a subterfuge to enable a prohibited person to possess firearms. Based upon these principles of possession, a prohibited person could reside in a residence where firearms were maintained without

> being considered in possession of those firearms if they are stored or located where the prohibited person is without the ability to exercise dominion or control over them. For example, if the firearm is located in a locked enclosure to which the prohibited person has no access, the prohibited person would not be considered to be in actual or constructive possession of the firearm.

Halbrook, at 228 (internal citation omitted).

While the BATFE's opinions all contain similar language noting that the firearm be stored or located where the prohibited person is without the ability to exercise dominion or control over them, such as in a locked enclosure or vault,[4] the opinions do not take into account *Heller*'s recognition that non-prohibited persons must be permitted to keep lawful firearms in the home accessible and operable "*for the purpose of immediate self-defense.*" *Heller*, 554 U.S. at 635 (emphasis added). Obviously, a firearm that is under lock and key is not immediately accessible, and any such requirement would frustrate *Heller*'s holding and the core right protected by the Second Amendment.[5]

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[4] *See id.* at 228-229.

[5] "We must also address the District's requirement (as applied to respondent's handgun) that firearms in the home be rendered and kept inoperable at all times. This makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional." *Heller*, 554 U.S. at 630.

Griffin illustrates that such measures are not required to ensure that a cohabitating family member does not retain constructive possession over firearms in violation of Section 922(g). In *Griffin*, the defendant, a prohibited person, resided in the home of his father following his release from confinement. An avid hunter, Griffin's father possessed several firearms and ammunition stored at varying locations throughout the home. Upon the execution of an unrelated search warrant, Griffin was arrested for a violation of Section 922(g)(1) upon the discovery of such items. While several of the firearms and ammunition were stored in common areas and easily accessible to Griffin, the court found that "'the Government must establish the likelihood that in some discernible fashion the accused had a *substantial* voice vis-à-vis the items in question'" and that "easy access does not mean that he actually violated the felon-in-possession statute by intending to exercise control over any of the firearms." *Griffin*, 684 F.3d at 698 (quoting *United States v. Ford*, 993 F.2d 249, 252 (D.C. Cir. 1993)). Ultimately, his conviction was reversed as the Government failed to establish "that Griffin intended to exercise control over his father's shotgun and the nearby ammunition." *Id.* at 699.

Griffin is remarkable in two aspects. Not only does it uphold the established principle that a prohibited person can reside in a residence where firearms are present, it also preserves the integrity of *Heller* by recognizing that cohabitants, and specifically cohabitating family members, can possess immediately

accessible firearms in the home under the core right of the Second Amendment without exposing prohibited persons to a violation of 922(g)(1)'s prohibition on possession, whether actual or constructive. As this Court emphasized, "whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635. Furthermore, law-abiding citizens must be given a *meaningful* right to use arms to defend themselves. Thus, this Court held "that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of *immediate* self defense." *Id.* (emphasis added).

In sum, *Griffin* belies the Government's contention that the simple possession of firearms in the home amounts to either actual or constructive possession of those firearms by others present in the home without a further demonstration of intent to exercise dominion or control over them. *Griffin,* 684 F.3d at 698.

III. Requiring assurances from lawful firearms owners that they will not aid a prohibited person in violating the law cannot be a constructive discretionary licensing system.

While the Government recognizes that a prohibited person's transfer to a law-abiding third party

does not *per se* run afoul of Section 922(g)(1)'s prohibition on possession, or even violate the Government's theory of constructive possession, it argues that a transfer only be approved following a decision maker's review of "sufficient assurances that the [prohibited person] would not retain effective custody and control over the weapons." U.S. Br. in Opp. at 15.

It is improper to require assurances in a manner that grants government officials unfettered discretion in determining whether a law-abiding citizen will be allowed to take possession of lawful firearms for use in the home.

In *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958), this Court invalidated a city ordinance due to the unfettered discretion granted in the decision maker as a result of a lack of "definitive standards or other controlling guides[.]" At issue in *Staub* was a challenge to an ordinance making it an offense to solicit membership in an organization without first obtaining a permit from the Mayor and Council of the City.[6] The *Staub* Court further held that:

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[6] "This ordinance in its broad sweep makes it an offense to 'solicit' citizens of the City of Baxley to become members of any 'organization, union or society' which requires 'fees (or) dues' from its members without first applying for and receiving from the Mayor and Council of the City a 'permit' (Sections I and II) which they may grant or refuse to grant (Section V) after considering 'the character of the applicant, the nature of the organization for which members are desired to be solicited, and

(Continued on following page)

> [i]t is settled that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official – as by requiring a permit or license which may be granted or withheld in the discretion of such official – is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.

Id. at 322.

While the "substantial assurance" requirement the Government now appears to support may not be a *per se* permitting system, *Staub* is instructive in light of the lack of "definitive standards or other controlling guides governing the action" of the decision maker in approving transfers, such as those the Government now proposes. *Id.* at 322.

And, while *Staub* was a First Amendment case, *Heller* similarly makes clear that "[t]he very enumeration of the [Second Amendment] right" likewise "takes out of the hands of government the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Heller*, 554 U.S. at 634. The Government does not outline in the present case how the "reasonable assurances" it calls for are to be adjudicated, thereby failing to establish "definitive standards or other controlling guides governing the

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its effects upon the general welfare of (the) citizens of the City of Baxley' (Section IV)." *Id.* at 321.

action," *Staub*, 355 U.S. at 322, and risking that the ultimate decision would result in the application of unfettered discretion by the decision maker.

Tellingly, the NRA is not aware of any law, state or federal, that imposes a discretionary permitting regime upon the right of law-abiding citizens to possess protected arms in the home. Indeed, only a small minority of states impose such a permitting system for the carrying of firearms *outside* the home, and there is a Circuit split regarding their constitutionality. *See Peruta v. County of San Diego*, 742 F.3d 1144, 1173-1175 (9th Cir. 2014). What is more, the courts that have upheld those laws have emphasized that the laws *do not* apply to possession in the home. *See Woollard v. Sheridan*, 712 F.3d 865, 869 (4th Cir. 2013) ("[P]ermits are *not* needed by persons who are wearing, carrying, and transporting handguns in their own homes.") (emphasis added); *Drake v. Filko*, 724 F.3d 426, 428 (3d Cir. 2013) ("Individuals who wish to carry a handgun *in public* for self-defense must first obtain a license.") (emphasis added); *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 83 (2d Cir. 2012) ("Plaintiffs all seek to carry handguns *outside the home* for self-defense.") (emphasis added). This Court should make clear that the government cannot impose, through the misapplication of Section 922(g) or otherwise, a may-issue regime for possession of firearms in the home.

IV. The Government seeks to create a separate class of individuals entitled to diminished Second Amendment rights solely by virtue of their relationship to a prohibited person.

The expansion of Section 922(g)(1) to place obstacles on the possession of firearms by acquaintances and family members of prohibited possessors, and even third-party purchasers, creates a separate class of individuals apart from all other lawful firearms owners protected under the Second Amendment. Through this expansion, the Government seeks to restrict firearms ownership by non-prohibited third parties solely on the unjustified premises that association with a prohibited person creates a heightened risk of aiding them with a violation of the law. Such a theory is comparable to the interest-balancing approach proposed by Justice Breyer, and rejected by this Court, in *Heller See Heller,* 554 U.S. at 634-635. This approach is completely antithetical to the Second Amendment and this Court's decisions in both *Heller* and *McDonald*, which provide ample support for the proposition that strict scrutiny applies to all laws that burden the fundamental right of law-abiding, responsible citizens to possess arms protected by the Second Amendment in their homes. While *Heller* did not recognize an unalienable right of every citizen to possess any type of firearm in any place and in any manner whatsoever, it did establish that the core of the Second Amendment right – at a minimum – protects a law-abiding, responsible citizen's ability

to possess common firearms in the home for personal protection. Whatever else it means for a constitutional right to be ranked as "fundamental," it surely means that the right is enjoyed by all law-abiding adults equally. Thus, a regulatory system that subjects a certain class of law-abiding citizens to special burdens when seeking to exercise Second Amendment rights must at a minimum be subject to strict scrutiny.[7]

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[7] When a law interferes with "fundamental constitutional rights," it is subject to "strict judicial scrutiny." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16 (1973); *see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 54 (1983) ("strict scrutiny [is] applied when government action impinges upon a fundamental right protected by the Constitution"). This observation is a mainstay of this Court's jurisprudence. *See, e.g., Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 n.14 (1985) ("governments are entitled to attack problems piecemeal, save where their policies implicate rights so fundamental that strict scrutiny must be applied"); *Reno v. Flores*, 507 U.S. 292, 302 (1993) (due process "forbids the government to infringe certain 'fundamental' liberty interests . . unless the infringement is narrowly tailored to serve a compelling state interest"); *Clark v. Jeter*, 486 U.S. 456, 461 (1988) ("classifications affecting fundamental rights . . . are given the most exacting scrutiny"); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution. . . "); *see also Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting) ("the standard of review that [is] appropriate" for "a fundamental right" is "strict scrutiny"); *Foucha v. Louisiana*, 504 U.S. 71, 115 (1992) (Thomas, J., dissenting) ("Certain substantive rights we have recognized as 'fundamental'; legislation trenching upon these is subjected to 'strict scrutiny'. . . ").

The classification proposed by the Government in this case cannot survive such exacting scrutiny.

CONCLUSION

For the foregoing reasons, this Court should rule in Petitioner's favor and reject the Government's position that it may burden the Second Amendment rights of law-abiding, responsible citizens because they are acquaintances or family members of prohibited persons, or even third-party purchasers.

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Respectfully submitted,

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